United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1903.

No. 1346.

239

BERNARD A. WAGGAMAN, GEORGE W. COLDENSTROTH, LATE COPARTNERS, TRADING UNDER THE FIRM NAME OF B. A. WAGGAMAN AND COMPANY, APPELLANTS,

vs.

GEORGE E. KEITH COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF MASSACHUSETTS, AND LEWIS A. CROSSETT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 1, 1903.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1903.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 9, 1903.

In the Court of Appeals of the District of Columbia.

BERNARD A. WAGGAMAN ET AL., Appellants,
vs.
GEORGE E. KEITH COMPANY ET AL.
No. 1346.

a Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN, GEORGE W. Coldenstroth, Late Copartners, Trading under the Firm Name of B. A. Waggaman and Company, Complainants,
vs
GEORGE E. KEITH COMPANY, a Corporation Organized under the Laws of the State of Massachusetts, and Lewis A. Crossett, Defendants.
No. 22733. In Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Original Bill to Enjoin, &c.*

Filed October 30, 1901.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN, GEORGE W. Coldenstroth, Late Copartners, Trading under the Firm Name of B. A. Waggaman and Company,
vs.
GEORGE E. KEITH COMPANY, a Corporation Organized under the Laws of the State of Massachusetts, — Lewis A. Crossett.
In Equity. No. 22733, Docket No. 51.

The bill of complaint of Bernard A. Waggaman and another against the George E. Keith Company and another in chancery exhibited.

Your complainants respectfully state as follows:

1. That your complainants are citizens of the United States of

America, and residents of the District of Columbia, and sue in their own rights.

2. That the defendant The George E. Keith Company, is a corporation organized under the laws of the State of Massachusetts, U. S. A., having its habitat and place of business at and in the town of Campello, in the said State, and is sued in its own right. The defendant Lewis A. Crossett is a citizen of the said United States, and a resident of the town of North Arlington, in the said State, and is sued is his own right.

2 3. That on and prior to, to wit, April 20, 1900, your complainants were engaged in the retail shoe business in said District as copartners trading under the firm name of B. A. Waggaman and Company; that on said date they were indebted to the defendant George E. Keith Company for a balance due for certain shoes in the sum of $541.80, which shoes had been manufactured by and purchased from the said defendant some time before said date; and that on said date they were also indebted to the defendant Lewis A. Crossett for a balance due for certain shoes manufactured by and purchased from him in the sum of $331.50.

4. That on or about said date your complainants, being indebted to the defendants as aforesaid, were the absolute owners, and in actual possession, of a large stock of new shoes, chiefly of the manufactures of the defendants, of the value at cost of $810.60; and of the value at retail of $945.00; that, having determined to dissolve their co-partnership and to liquidate their firm affairs, they had fully satisfied all of the claims of all firm creditors other than the defendants, with the exception of their landlord who claimed a lien for rent upon the said stock of shoes; and that by the sale of the said shoes at retail by private sale or auction and by single pairs or small lots your complainants could readily have realized sufficient, or more than sufficient, money to discharge in full the said claims of the defendants and landlord.

5. That on, or about said date the defendant George E. Keith Company contracted and agreed with your complainants to take and accept from them all of the said new shoes, then the property, and in the possession, of your complainants, and of the aforesaid values at cost and retail, in full settlement, liquidation, satisfaction

3 and discharge of the said sums then due from your complainants to the defendant- Lewis A. Crossett and George E. Keith Company, which company was to and did then personally assume and agree to pay and discharge in full the said debt due from your complainants to the defendant Lewis A. Crossett; that in strict conformity with the said contract and agreement your complainants, on or about said date, delivered to the said defendant George E. Keith Company all of the aforesaid merchandise, consisting of new shoes, of the values aforesaid, and the said defendant George E. Keith Company then and there accepted and received the same in full settlement, liquidation, satisfaction and discharge of, its own said account, and the said account of the defendant Lewis A. Crossett, against your complainants; and that, in order to fully perform the

said contract and agreement upon their part, your complainants fully discharged and satisfied the said lien for rent of their said landlord, upon the said stock of shoes, closed their store, surrendered their lease, dissolved their copartnership, and retired from the said business, owing no debts whatever by reason thereof.

6. That soon thereafter the defendant George E. Keith Company paid to the defendant Lewis A. Crossett, on account of the said indebtedness of your complainants to him, the sum of $83.16, leaving an alleged balance due of $248.84; and that soon thereafter the said George E. Keith Company credited its said account against your complainants with the sum of $505.13, leaving an alleged balance due it of $36.67.

7. That the defendant George E. Keith Company, retaining the said shoes and not offering and refusing to return them or any
4 part thereof, has paid to the defendant Lewis A. Crossett the sum of only $83.16 of the said $331.50, which it assumed and agreed to pay as aforesaid, and has refused and still refuses to pay
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the said balance of $248.84; and that it has also refused and still refuses to balance and close its said account against your complainants; that the defendant Lewis A. Crossett, since being fully cognizant of the terms and conditions of the said contract and agreement, has retained and still retains the said sum of $83.16, and, not offering but refusing to return the same or any part thereof, has refused and still refuses to balance his said account against your complainants, or to require the said George E. Keith Company to satisfy and pay the same in full.

8. That the defendant George E. Keith Company is justly indebted unto the defendant Lewis A. Crossett in the full sum, if any, now due and owing to him on account of the said indebtedness formerly due to him from your complainants; and that the aforesaid contract and agreement, and the full execution and performance thereof as aforesaid by your complainants, constituted a complete accord and satisfaction in law as against the George E. Keith Company, and a complete account stated and full settlement and satisfaction thereof.

9. That the said contract and agreement also provided that if the said merchandise, so delivered by your complainants and accepted by the defendant George E. Keith Company as aforesaid, should be of a greater value than the aggregate amount of the said two accounts, then, so it was agreed, the defendants should retain the surplus to their own use; but if the same should be of less value, then your complainants were not to be held liable for the deficiency.

5 10. That the defendant George E. Keith Company has repudiated the said contract and agreement and its obligations thereunder, but has never returned nor offered to return the said shoes nor any part thereof, and has refused and still refuses so to do, or to fulfill its said obligations; that *no* November 19, 1900, the said George E. Keith Company instituted an action at law No. 47887, against your complainants, before Anson S. Taylor, Esq., one of the

justices of the peace in and for the District of Columbia, for the recovery of the said alleged balance of $36.67, which action is still pending. Issue has been joined therein, but no verdict or judgment has been obtained.

11. That the defendant Lewis A. Crossett denies that he was a party to or bound by the said contract and agreement, but admits that the said George E. Keith Company paid him the said $83.16, and that he credited the same upon his said account against your complainants; that the said Lewis A. Crosett has since fully learned of the terms and conditions of the said contract and agreement, but, while repudiating the same, he has retained and still retains the said $83.16, and has never returned nor offered to return the said sum or any part thereof, but so to do he has refused and still refuses; that on November 19, 1900, the said Lewis A. Crossett instituted an action at law, No. 47,888, against your complainants, before the said Anson S. Taylor, Esq., for the recovery of
3
the said alleged balance of $248.84, which action is still pending. Issue has been joined therein, but no verdict or judgment has been obtained.

12. That the attorneys for the said defendants in the said actions at law are the same persons, and they were fully advised of
6 the rights of your complainants before they filed the said actions, and, as the defendants are non-residents of the District of Columbia and cannot be served personally with process, your complainants are entitled to an order allowing the process in this suit to be served upon their said attorneys of record in the said actions at law.

13. That the aforesaid acts of the defendants, and especially those of the said George E. Keith Company, constitute a gross, wilful and deliberate fraud upon the rights of your complainants, and will cause a multiplicity of actions or suits, against which your complainants have no remedy at law, and against which they are entitled to be relieved by decree of this court; and especially so as your complainants charge and aver that the said George E. Keith Company obtained the said stock of shoes from your complainants by intentionally false and fraudulent representations upon its part, which were implicitly relied upon by your complainants, and without any intent or purpose whatever upon its part to carry out or perform its duties and obligations under the said contract and agreement, but with the fraudulent intent upon its part to get possession of the said shoes and keep the same, and then to repudiate the said contract or agreement, and then to sue, and cause the said Lewis A. Crossett to sue, your complainants for whatever balance or deficiency it or he might choose to claim, all of which it has done according to its preconceived secret and fraudulent intent.

14. That your complainants are justly entitled to have the defendants enjoined from prosecuting their said actions at law,
7 and to have all of the said matters in dispute completely adjusted and settled by this court in this one suit.

The premises considered, your complainants humbly pray as follows:

Prayers.

1. That process may issue requiring the defendants and each of them to appear and answer the exigencies of this bill of complaint, but not under oath.

2. That the process in this suit may be served upon the defendants' attorneys of record in the said actions at law.

3. That the defendants may be enjoined *pendent- lite* and perpetually from prosecuting their said actions at law.

4. That all of the said matters and things in dispute between your complainants and the defendants may be completely adjusted and settled by decree in this suit.

5. That your complainants may have such other and further relief as the court may consider proper.

And, as in duty bound, your complainants will ever pray, etc.

The defendants to this bill of complaint are George E. Keith Company and Lewis A. Crossett.

BERNARD A. WAGGAMAN.
GEORGE W. COLDENSTROTH.

THOMAS M. FIELDS,
MILTON STRASBURGER,
Solicitors for Complainants.

8 DISTRICT OF COLUMBIA, *ss:*

We, Bernard A. Waggaman and George W. Coldenstroth, being first duly sworn, do solemnly depose and say that we have carefully read the foregoing bill of complaint by us subscribed, and know the contents thereof; that the matters and things therein stated upon our personal knowledge are true; and that those therein set forth upon information and belief we believe to be true.

BERNARD A. WAGGAMAN.
GEORGE W. COLDENSTROTH.

Subscribed and sworn to before me this thirtieth day of October, A. D. 1901.

J. R. YOUNG, *Clerk,*
By R. J. MEIGS, JR.,
Assistant Clerk.

Affidavit of Waggaman.

Filed October 30, 1901.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN, GEORGE W. Coldenstroth, Late Co-partners, Trading under the Firm Name of B. A. Waggaman and Company, *vs.* GEORGE E. KEITH COMPANY, a Corporation Organized under the Laws of the State of Massachusetts; — Lewis A. Crossett.	In Equity. No. 22733, Docket No. 51.

Bernard A. Waggaman, being first duly sworn, deposes
9 and says as follows:—

I am one of the complainants in this suit. On or about April 20 or 21, 1900, Mr. George W. Coldenstroth and I were co-partners in a retail shoe business carried on by us in premises No. 1311 F street, N. W., in the city of Washington, District of Columbia. Shortly prior to said date we concluded to dissolve our co-partnership, pay all of our firm debts in full, close our store, surrender our lease, and retire from the said shoe business. By way of carrying out this conclusion we had paid, from time to time, all of our firm creditors in full, with the exception of the defendants in this suit, and our landlord. We still had a stock of new shoes in our store, manufactured chiefly by the defendants, which cost us $810.60, and which were of the retail value of $945.00. These goods we could have really sold in such a way as to yield us at least sufficient money to pay in full the claims of the defendants and our landlord. On the date mentioned Mr. George H. Leach, representing The George E. Keith Company, one of the defendants herein, called upon us in this city regarding the settlement of the claim of the Keith Company against us. At Mr. Coldenstroth's suggestion Mr. Leach and I called upon Mr. Thomas M. Fields, our attorney at his residence for the purpose of reaching, if possible, some mutually satisfactory agreement for settlement of the Keith Co. claim. We saw Mr. Fields when we called. The details of the Keith Co. and Crossett accounts were discussed, and also various other details of the firm's affairs. Several offers were made and rejected. Then an offer was made to Mr. Leach to deliver to him free of our landlord's lien all of the stock of shoes on hand and in
10 our store in full settlement of the Keith Co. claim and the claim of Mr. Crossett against us, the Keith Co. to assume and pay our debt to Mr. Crossett, any surplus to be kept by them and any deficiency to be borne by them. Mr. Leach accepted

this offer without any qualification, and requested the immediate delivery of the goods to him. Mr. Fields advised me to turn over the stock to Mr. Leach at once, making a list of the shoes when delivered, which I did. Mr. Leach and I then left Mr. Fields, and I at once delivered all the stock to Mr. Leach. It was thoroughly understood between Mr. Leach and us that the goods were accepted by him in full settlement of both the Keith Co. and Crossett accounts, the latter to be personally assumed and at once paid in full by the Keith Co. The stock would not have been delivered to him otherwise. We subsequently secured a release of the landlord's lien, and carried out the balance of our said conclusion as to our firm affairs.

Some time afterwards the Keith Co. sent me a letter claiming a balance due it. I was then engaged in selling shoes by sample on my own account. Mr. Coldenstroth did not see nor know of this letter until this year, a long time after it was written. At the time I received it I was contemplating going into the retail shoe business on my own account, opening a new store, etc. In this enterprise, and in my then said business, I desired the assistance of the Keith Co. To this end I replied to said letter, without the knowledge or consent of Mr. Coldenstroth, upon one of the late firm's letter-heads, promising to pay the balance claimed. I thought that the aid of the Keith Co. to me in my business was of more value to me that the amount of its claim, or a contest by me over it, although I knew that we did not owe it. There was no consideration whatever for
11 my said promise. Mr. Coldenstroth immediately repudiated my promise to pay, so far as he was concerned, as soon as he learned of it.

The amounts which we owed the Keith Co. and Mr. Crosset on April 20 or 21 1900, are correctly stated in our bill of complaint herein. Both the Keith Co. and Mr. Crossett were fully aware of the terms and conditions of the said settlement of said date as made and claimed by us for sometime before they sued us. They have never returned nor offered to return the shoes, or anything else in lieu thereof, nor has either of them so done or offered to do.

And further affiant saith not.

BERNARD A. WAGGAMAN.

Subscribed and sworn to before me this thirtieth day of October, A. D. 1901.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Affidavit of Coldenstroth.

Filed October 30, 1901.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN, GEORGE A. COLDENSTROTH, Late Co-partners, Trading under the Firm Name of B. A. Waggaman and Company, *vs.* GEORGE E. KEITH COMPANY, a Corporation Organized under the Laws of the State of Massachusetts, — Lewis A. Crossett.	In Equity. No. 22733, Docket No. 51.

George W. Coldenstroth, being first duly sworn, deposes and says as follows:

12 I am one of the complainants in this suit. On or about April 20 or 21, 1900, Mr. George H. Leach, representing the defendant George E. Keith Company, called upon me regarding the settlement of the bill which the firm of B. A. Waggaman and Co. owed it. Mr. Waggaman was present. After talking for some time about the matter I suggested that he and Mr. Waggaman should see our attorney, Mr. Fields, and agree upon a plan of settlement, if possible. They then left. Later in the day Mr. Leach again called on me, and stated to me that he and Mr. Waggaman had seen Mr. Fields, and had agreed upon a settlement.

This agreement, Mr. Leach then told me, was that we were to deliver all of our stock of new shoes in our store to him at once, and that he was to take them in full satisfaction of both the Keith Co. claims and Mr. Crossett's claim against us, which claim of Mr. Crossett the Keith Co. personally assumed and agreed to pay in full at once, and that any surplus was to be kept by them and any deficiency borne by them. I agreed to this settlement. The goods were at once delivered to Mr. Leach. It was thoroughly understood between Mr. Leach and me that he took the stock in full settlement of both claims, and free of the lien for rent of our landlord, which we were to have released, and which we did subsequently have released. The stock would not have otherwise been delivered to Mr. Leach, as we could have gotten enough money out of it to pay in full the Keith Co., Mr. Crossett and our landlord. No claim was ever afterwards made upon me for any alleged balance due the defendants until about the early part of October, 1900, through their attorneys, and I have never since in any manner admitted any indebtedness to them or

13 either of them. I knew nothing whatever of the Keith Co. letter to Mr. Waggaman, or his answer thereto, until about one year after they were written, and immediately repudiated the

same so far as I was concerned. Both the Keith Co., and Mr. Crossett were fully aware of the terms and conditions of our settlement with Mr. Leach, as made and claimed by us, for sometime before they sued us. They have never returned nor offered to return the said shoes to us, or anything else in lieu thereof, nor has either of them ever so done or offered to do.

And further affiant saith not.

GEORGE W. COLDENSTROTH.

Subscribed and sworn to before me this thirtieth day of October, A. D. 1901.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS,
Assistant Cl'k.

Affidavit of Fields.

Filed October 30, 1901.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN, GEORGE W. COLDENSTROTH, Late Co-partners, Trading under the Firm Name of B. A. Waggaman and Company, *vs.* GEORGE E. KEITH COMPANY, a Corporation Organized under the Laws of the State of Massachusetts, — Lewis A. Crossett.	In Equity. No. 22733, Docket No. 51.

Thomas M. Fields, being first duly sworn, deposes and says as follows:

On or about Friday, April 20, 1900, I represented the
14 complainants in this suit in certain negotiations with Mr. George H. Leach, a representative of the defendant George E. Keith Company, for the settlement in full of the claims of the said company and Lewis A. Crossett against the complainants herein. These negotiations, so far as I was personally concerned therein, occurred at my residence. Mr. Leach, Mr. Waggaman and I were present. After some conversation about the sums due and various other details, several offers and counter-offers for settlement were made and declined. Finally an offer was made to Mr. Leach to deliver to him all of the stock of shoes in the complainant's then store, free of the landlord's lien for rent, if the George E. Keith Company would close and balance in full its account against the complainants, and would also assume and pay in full Mr. Lewis A. Crossett's claim against them, any surplus to be retained by the two creditors and any deficiency to be borne by them. This offer was accepted by Mr. Leach without qualification. I then directed Mr.

Waggaman to deliver the shoes to Mr. Leach at once, at the latter's request, making a list of them when delivered. Mr. Leach and Mr. Waggaman then left, and I have never since seen the former. I subsequently procured a release of the landlord's lien. I should not have advised the delivery of all of the shoes to Mr. Leach except upon condition that the stock should fully discharge the debts of both the George E. Keith Company and Mr. Crossett against the complainants, as, with the exception of them and the landlord, as I was advised, all other firm creditors had been paid in full, and the goods in the store could have been readily made to yield enough to satisfy all outstanding firm debts. The complainant's desire was to settle in full with all firm creditors, dissolve their copartnership, close their store, surrender their lease, and retire from the shoe business, all of which they did under my personal direction and advice. I thoroughly understood that Mr. Leach, acting for the George E. Keith Company, accepted the shoes in full satisfaction of both its debt and that of Mr. Crossett, which it was to pay, and it was upon such understanding only that I advised and directed the immediate delivery to him, of all of the shoes in the complainant's then store.

The following correspondence regarding the matters in dispute, took place between myself and the attorneys for the defendants before the actions at law, mentioned in the bill of complaint herein, were instituted.

OCTOBER 16, 1900.

Messrs. Ralston & Siddons, counsellors at law, city.

GENTLEMEN: In reply to your favor of October 5, 1900, addressed to Mr. George W. Coldenstroth, of this city, and in line with my statements in your office a day or two ago, I beg to advise you as follows:

I have carefully investigated the matter of the two claims, in your hands for collection and referred to in your letter. They are erroneously stated in your letter as notes. You also state the claim of Crossett in your letter as $31.50.

In April of this year B. A. Waggaman & Co. turned over to the agent of George E. Keith Co. certain goods made by them, and certain other goods made by Crossett, at the cost price thereof, which amounted to $810.60. These goods were new, and were taken possession of by Keith Co. with the express understanding and agreement that the Keith Co. accepted them in full satisfaction of all of its claims against B. A. Waggaman and Co. and that the Keith Co. would settle in full the claim of Crossett against B. A. Waggaman & Co., which at that time amounted to $331.50. From correspondence in our hands it appears that Keith Co. and Crossett had some understanding between themselves in regard to this matter.

The result arrived at is that B. A. Waggaman & Co. are not in-

debted to the Keith Co. in any amount whatever, and they do not believe that they are indebted to Crossett in any sum. If the Keith Co. has failed to carry out its agreement to settle in full all claims of Crossett against Waggaman & Co., we will certainly sue the Keith Co. for the recovery of the sum which that company ought to have paid Crossett in order to discharge his claim in full, because we turned over to the Keith Co. sufficient goods not only to discharge its own claim in full but also the claim of Crossett, which it agreed to do. We have been under the impression all of the time since we made the settlement with the Keith Company that these matters had been fully closed and settled in accordance with the agreement under which we turned over the goods to the Keith Company. We are at loss to understand why any such claims should have been made against us in view of the matters above stated.

We must, therefore, decline to pay the accounts referred to by you and in your hands for collection. If we be sued we will, of course, sue Keith Co. if it shall appear that the company has not
17 kept its agreement with us as to the Crossett account.

Thanking you for your courtesy in the matter, I am,

Very truly yours,

THOMAS M. FIELDS,
Attorney for Messrs. B. A. Waggaman & Co. and George W. Coldenstroth.

NOVEMBER 5, 1900.

Thomas M. Fields, Esq., city.

DEAR SIR: In reference to the matter of Geo. E. Keith Co. and Lewis A. Crossett *vs.* Waggaman & Co. we beg to say that our clients state that the goods taken possession of by Keith's agent, were not taken with any understanding that they should be accepted in full satisfaction of its claims, and that they did not agree to settle in full the claim of Crossett. They have furnished us with itemized statements of their accounts, and instructed us to bring suit.

Truly yours,
RALSTON & SIDDONS.
J-D. R.

And further affiant saith not.

THOMAS M. FIELDS.

Subscribed and sworn to before me this thirtieth day of October, A. D. 1901.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

18 *Restraining Order.*

Filed October 30, 1901.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN, GEORGE W. Coldenstroth, Late Co-partners, Trading under the Firm Name of B. A. Waggaman and Company,
vs.
GEORGE E. KEITH COMPANY, a Corporation Organized under the Laws of the State of Massachusetts, — Lewis A. Crossett.

In Equity. No. 22733, Docket No. 51.

Upon consideration of the bill of complaint, and affidavits in support thereof, it is, this thirtieth day of October, A. D. 1901, ordered as follows:

1. That the defendants be and they are hereby enjoined from prosecuting their actions at law No. 47,887 and No. 47,888, against the complainants, before Anson S. Taylor, Esq., justice of the peace, until the further order of this court, to be made, if at all, on November 7, A. D. 1901, at ten o'clock a. m.

2. That the process in this suit and a copy of this order be served upon the defendant's attorneys of record in the said actions at law.

3. That the defendants show cause, if any they have, on or before the said November 7, A. D. 1901, at ten o'clock a. m., why they shall not be enjoined pending this suit from prosecuting their said actions at law.

4. That a copy of this order be served upon the defendants' attorneys of record in the said actions at law at least three days before the said November 7, A. D. 1901.

By the court:

A. C. BRADLEY, *Justice.*

19 *Answer of George E. Keith Co.*

Filed December 3, 1901.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN, GEORGE W. COLDENstroth, Late Copartners, Trading under the Firm Name of B. A. Waggaman and Company,	Equity. No. 22733, Docket 51.
vs.	
GEORGE E. KEITH COMPANY, a Corporation Organized under the Laws of the State of Massachusetts, — Lewis A. Crossett.	

The answer of George E. Keith Company, one of the defendants to the bill of complaint filed herein, respectfully shows as follows:

1. It admits paragraphs one, two and three of said bill of complaint.

2. Answering paragraph four of said bill of complaint this defendant can neither admit nor deny the allegations therein made; but if said allegations or any of them be deemed material by the court, demand strict proof thereof.

3. This defendant denies each and every allegation and statement contained in said paragraph five of said bill of complaint, and declares the same to be false in every particular, and without any foundation whatsoever.

20 4. This defendant admits paragraph six of said bill of complaint.

5. Answering paragraph seven of said bill of complaint, this defendant admits that it paid to its co-defendant Lewis A. Crossett—fifty-eight dollars and sixteen cents ($58.16) but denies that it assumed and agreed to pay said co-defendant any other sum; and admits that it has refused, and still refuses to balance and close its account against complainants. This defendant is informed and believes that its co-defendant—Lewis A. Crossett—has no knowledge of any such contract as is set forth in said paragraph five of said bill of complaint; and it is also informed and believes that its said co-defendant retains the said sum of $58.16 and refuses to balance its said account against the complainants or to require this defendant to satisfy and pay the same in full.

6. Answering paragraph eight of said bill of complaint this defendant denies each and every allegation therein contained.

7. This defendant denies each and every allegation set forth in paragraph nine of said bill of complaint.

8. This defendant admits the allegations of paragraphs ten, eleven and twelve.

9. This defendant denies that it has perpetrated or attempted to

perpetrate any fraud upon these complainants, or that its actions or conduct have caused or will cause a multiplicity of actions or suits entitling said complainants to equitable relief; and it denies that it obtained from the complainants anything by false or fraudulent representations.

21 10. This defendant denies the allegations set forth in paragraph fourteen in said bill of complaint.

11. And further answering said bill of complaint this defendant avers as follows: That prior to April 20, 1900 the complainants were justly indebted unto this defendant in the sum of five hundred and forty-one dollars and eighty cents, ($541.80) for certain shoes of its own manufacture, sold and delivered by this defendant to the complainants on open account; and on or about the same date, Mr. George H. Leach, the assistant credit clerk for this defendant being then at the place of business of these complainants in Washington, D. C., agreed with the complainant, Bernard A. Waggaman, who stated that he was acting with the consent and advice of his partner—Mr. Coldenstroth, and their attorney, Mr. Fields, to take off his hands such part of his stock of boots and shoes as was supplied by this defendant, and ship them to Campello, Massachusetts, to be sold at the best possible price, the net proceeds of the sale to be credited on the account of this defendant; and arrangements for the transportation of said goods were immediately made; during these arrangements, a Mr. Betz, a buyer for Edmonston, a shoe dealer in Washington, called at the store of the complainants where the complainant Waggaman, and the said Leach were engaged in boxing said goods for shipment, stating that he had heard the stock was to be disposed of, and called with an idea of buying it. After conversation in regard to price, in which the complainant Waggaman joined, it was agreed that Mr. Betz should take all of the goods of this defendant's manufacture at 70 % of the invoiced price. At this juncture Mr. Betz inquired about the balance of the stock, which was made

22 up of certain goods made by Lewis A. Crossett, the co-defendant hereto, and one Heywood, according to the statement of the said Waggaman. After further conversation it was agreed that Mr. Betz should take the entire stock of the complainants, with the understanding between Mr. Waggaman, Mr. Betz and the said Leach, that the goods of other manufacturers should be sold also for 70%, and the proceeds credited in part payment of their respective accounts, provided the other manufacturers consented to the arrangement. The transfer was thereupon consummated, and this defendant received as result thereof the sum of five hundred and five dollars and thirteen cents ($505.13), which it credited to its account against said complainants, leaving a balance of thirty-six dollars and sixty-seven cents ($36.67) which balance is still due and unpaid. After said transaction, the complainant Waggaman individually, and on a subsequent occasion said Waggaman and Mr. Thomas M. Fields, attorney for complainants, together, acknowledged the balance claimed, and promised that the same should be settled. It was suggested that a note be given in settlement of the balance, but Mr.

Fields explained that a settlement pending with the landlord in regard to the lease might require ready cash, and that they did not want to feel that they must pay a certain sum at a certain time on that account. Subsequently on June 5, 1900, this defendant received from the complainant Bernard A. Waggaman, a letter acknowledging the balance, and promising that the same should be settled as soon as he got through with the question of the lease. The original letter is attached to the deposition on behalf of this defendant in the suit at law now pending before A. S. Taylor, justice of the peace, referred to in the bill of complaint. A copy of
23 said letter is attached hereto and prayed to be read as a part hereof. And this defendant says that no denial of the existence of the balance, and no suggestion of any such agreement as that set up, in paragraph five of said bill of complaint was ever made until its claim was placed in the hands of their attorneys for collection; but on the contrary, the complainant Bernard A. Waggaman, who was the active partner in said business at all times, admitted the existence of such balance, and promised its settlement. And this defendant says that the suits referred to in the bill of complaint herein, have been pending for nearly a year, the complainants having taken advantage of every technicality to delay their hearing, but that the same are now ready for trial, and that the depositions taken in said cases amply prove and support the facts as set out in this answer.

12. This defendant further says that even if the allegations set up in paragraph five of the bill of complaint were true, they afford no ground for equitable relief; that this defendant is a perfectly solvent corporation, now doing a large business, and abundantly able to answer to any judgment which might be recovered against it in any suit that may be brought to recover for a breach of the alleged contract or agreement set up in said paragraph five; and that these complainants have themselves multiplied the actions growing out of this controversy by bringing this defendant into court to answer this bill of complaint, when their remedy at law is perfect and adequate; and this defendant submits to this honorable court that all and every of the matters in said complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said com-
24 plainants are not entitled to any relief from a court of equity.

And this defendant prays the same benefit of this defense as if he had demurred to said bill; and having fully answered, prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

G. W. KEITH COMPANY,
By D. CAREY KEITH, *Treasurer.*

STATE OF MASSACHUSETTS, }
City of Boston, } *ss:*

I, D. Carey Keith, do solemnly swear that I am the treasurer of the George E. Keith Company, a corporation, and am duly authorized to make this oath, and that I have read the foregoing answer subscribed by me for the company, and know the contents thereof; and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief, I believe to be true.

D. CAREY KEITH.

Subscribed and sworn to before me, this 15th day of November, A. D. 1901.

THOMAS F. DOLAN,
Notary Public.

[SEAL.]

25 Copy.

WASHINGTON, D. C., *June* 5, 1900.

Mr. D. Cary Keith, Campello, Mass.

DEAR SIR; I have received a letter from your firm in regard to the balance due your firm for good- we received, and will say that we will settle it alright as soon as we get through with the lease question, at present it look- as if we well have to pay the rent, it is in the hand of our lawyer, I have started a custom shoe dep't in the Phœnix bldg. with Mr. Jasper late manager for the Regal shoe in this city, and we are taking order- on the outside for custom work and also for your good- and we have been doing good business with the Emerson firm on a 5 % and 10 % basis, now what we would like to do, would be for you to send us some sample- and send us the good- we would order to us C. O. D. with your goods we know we could do a good business and send you some good order-.

Hoping to have a favorable reply from you,

I am sir, your- resp.,

(Signed) B. A. WAGGAMAN.

P. S.—Please send me a pair of lot 202 enamel size 7 C at once C. O. D. $2.60.

26 *Answer of Lewis A. Crossett.*

Filed December 3, 1901.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN, GEORGE W. COLDENSTROTH, Late Copartners, Trading under the Firm Name of B. A. Waggaman and Company, *vs.* GEORGE E. KEITH COMPANY, a Corporation Organized under the Laws of the State of Massachusetts, — Lewis A. Crossett.	Equity. No. 22733, Docket 51.

The answer of Lewis A. Crossett, one of the above named defendants to the bill of complaint herein filed, shows as follows:

1. I admit paragraphs one, two and three of said bill of complaint.

2. I have no personal knowledge concerning the matter stated in paragraph four of said bill, and can neither admit nor deny the same, and if they be material demand strict proof thereof.

3. I have no personal knowledge of the matters stated in paragraph five of said bill of complaint, except that I was never a party to any such alleged contract or agreement as therein set up between the complainants and the defendant George E. Keith Company; and
but I am informed and believe that no such contract ever existed between said parties; and if the same be deemed material, demand strict proof thereof.

27 4. I deny that the George E. Keith Company paid me the sum of $83.16, the amount paid me by said company being only $58.16.

5. I admit that I have refused, and still refuse to balance my account against complainants, or to require the said George E. Keith Company to satisfy and pay the same in full, and deny that there is any obligation on my part to do so.

6. I deny the allegations of paragraphs eight, and nine in toto.

7. I admit the allegations of paragraphs ten, eleven and twelve.

8. I deny that I had perpetrated or attempted to perpetrate any fraud upon these complainants or that my actions or conduct has caused or will cause a multiplicity of actions or suits entitling said complainants to equitable relief. And I deny that I obtained from the complainants anything by false or fraudulent representations.

9. I deny the allegations set forth in paragraph fourteen in said bill of complaint.

10. And further answering said bill of complaint, I say that prior to April 20, 1900 the complainants were justly indebted unto me in

the sum of three hundred and thirty-one dollars and fifty cents ($531.50) and about that time or shortly thereafter I received a communication over the telephone from the George E. Keith Company with reference to taking the goods of my manufacture in the possession of the complainants in this bill, selling them for what they would bring and crediting my account against complainants
28 with the proceeds. Upon receiving the information, I instructed my credit man to notify the George E. Keith Company or their representative, Mr. Leach, that if Mr. Waggaman wished, I would agree that the stock in his possession of my manufacture should be sold, and the amount realized therefrom credited on my account against B. A. Waggaman & Co. This was all the information that I had on the subject, and all the instructions that I gave. I never authorized or empowered any person to give these complainants to understand that they could settle with me for less than the full amount of my claim, and I never heard of any such claim on their part until my account had been placed in the hands of my attorneys for collection. I have only met Mr. Leach once or twice in my life, and those occasions were subsequent to the bringing of suit by me against the complainants herein. On May 31, 1900 I received from George E. Keith Company a check for fifty-eight dollars and sixteen cents, ($58.16) which was stated to be the net amount realized from the sale of the goods of my manufacture in the possession of the complainants herein. This amount was thereupon credited on the amount and leaves a balance due now and justly owing by the complainants to me of $273.34; that the George E. Keith Company never had any authority from me written, verbal or otherwise to settle my account against the complainant herein, and I do not believe that they or their agents ever claimed such authority; but whether said authority were claimed or not, it did not exist, and it is not shown in the bill that I was or am a party to or connected in any manner with the alleged contract or agreement set up in said bill, and I submit that the complainants have not in their bill shown any case in equity, or case entitling
29 them to proceed against me in this honorable court, and I pray all such benefit as if I had demurred to the said bill.

LEWIS A. CROSSETT.

STATE OF MASSACHUSETTS, }
City of Boston, } *ss:*

I do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof; that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief, I believe to be true.

LEWIS A. CROSSETT.

Subscribed and sworn to before me, this 8th day of November, A. D. 1901.

THOS. F. DOLAN,
Notary Public.

Affidavit of Leach.

Filed December 3, 1901.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN, GEORGE W. COLDENSTROTH, Late Copartners, Trading under the Firm Name of B. A. Waggaman and Company,
vs.
GEORGE E. KEITH COMPANY, a Corporation Organized under the Laws of the State of Massachusetts, — Lewis A. Crossett.

Equity. No. 22733, Doc. 51.

STATE OF MASSACHUSETTS, *City of Boston*, } *ss:*

30 George H. Leach, being first duly sworn on oath deposes and says: I am twenty-four years of age, and am assistant credit clerk of George E. Keith Company, one of the defendants in the above entitled suit, and have occupied such position for about four years; and in the course of such employment became personally acquainted with the complainants in this suit, having met them about April 20, 1900. I called on said complainants about that time with a view of obtaining a settlement of the account of the George E. Keith Company against them upon which there was a balance then due of five hundred and forty-one dollars and eighty cents ($541.80), and after some conversation, it was agreed between Mr. Waggaman, acting with the consent and advice of his partner—Mr. Coldenstroth and their attorney—Mr. Fields—and myself to take off his hands such part of his stock of boots and shoes as was supplied by the George E. Keith Company, and ship said George E. Keith Company's goods to Campello to be sold at the best possible price, the net proceeds of sale to be credited to his account with said George E. Keith Company. In conversation I stated that this sale would probably realize about 70% of the invoice price. After I had arranged with the transportation company to take and ship the goods to Campello, Mr. Betz, buyer for Edmonston & Co. shoe dealers in Washington, called at the store of defendants where Mr. Waggaman and I were engaged in stacking up the George E. Keith Company's goods preparatory to boxing them for shipment, and stated that he had heard that the stock was to be disposed of and called with an idea of buying it. After some talk in regard to prices, Mr. Betz agreed to take all of the George E. Keith Company's goods at 70% of the invoice price. At this junction Mr. Betz inquired about the balance of the stock, which in the shoe line was made up
31 of certain goods made by Lewis A. Crossett and one Heywood, according to the statement of Mr. Waggaman. I told Mr.

Betz that I had nothing to do with these goods and had only authority to act in behalf of the George E. Keith Company. Mr. Betz was anxious to take the entire stock, and with Mr. Waggaman's consent, the entire shoe stock of the defendants was delivered to Edmonston & Co., on Saturday, April 21, 1900, with the understanding between myself Mr. Betz and Mr. Waggaman, that the goods of other manufacturers should be sold for 70% also, provided Mr. Crossett consented to the arrangement. When I got home I called up Mr. Crossett by telephone and submitted to him the proposition, and was informed by his credit-man that Mr. Crossett was willing that the stock in the possession of the complainants herein of Crossett's manufacture might be sold and he would accept the proceeds as part payment on account of his claim against these complainants. The stock in the possession of the complainants at that time included shoes of the manufacture of the George E. Keith Company, shoes of the manufacture of Lewis A. Crossett and shoes of the manufacture of one Heywood, all of which were turned over to Edmonston & Co. at 70% of their invoice price, and as a result of which the Geo. E. Keith Co. received from Edmonston & Co. four hundred and eighty dollars and thirteen cents ($480.13) as the net proceeds of the sale of the Keith shoes, and twenty-five dollars ($25.00) as the net proceeds of the sale of the Heywood shoes and fifty-eight dollars and sixteen cents ($58.16) as the net proceeds of the Crossett shoes. The net proceeds of the Keith and Heywood shoes amounting to five hundred and five dollars and thirteen cents ($505.13) was paid over to the George E. Keith Company, and credited by them on their account against these complainants; and the $58.16
32 proceeds of the sale of the Crossett shoes was paid over to Lewis A. Crossett to be credited as part payment on his account against the complainants. At no time during the negotiation had between myself and the complainants herein did I assume or claim to have any authority to bind. Mr. Crossett by any agreement or contract I might make, and as a matter of fact, I had no such authority. I had never met Mr. Crossett at all at that time and had had no conversation with him or his representatives prior to the negotiations; in fact until I reached Washington and the negotiations had begun I did not know that Crossett was interested at all, and did not know that any of Crossett's shoes were in the possession of these complainants until the conversation above referred to, when I was so informed by Mr. Waggaman; and the negotiations so far as Crossett was concerned were merely tentative, and with the distinct understanding that they were made subject to the approval of Mr. Crossett. At no time during said conversation nor at any other time was it ever suggested to me by either of the complainants or by their attorney, Mr. Fields, that the proposed transfer of the stock should be made in full settlement either of the account of the George E. Keith Company or of the said Lewis A. Crossett. On the contrary, it was thoroughly understood that it was not to be; and I distinctly recall a conversation had at the residence of Mr. Fields, at which time Mr. Waggaman

was present, in which I suggested that I be given a note in favor of George E. Keith Company to settle the balance of the Keith account, which after — credited with $505.13, net proceeds of the sales to Edmonston, was $36.67; but Mr. Fields said that there was some complication over the settlement with the land-
33 lord in regard to the lease of the premises which had been occupied by these complainants, and that this settlement might demand ready cash, and that they did not want to feel that they must pay a certain sum at any certain time on that account; and sometime subsequent to that Mr. Waggaman wrote a letter acknowledging the balance, and promising its payment, a copy of said letter being attached to the answer of the George E. Keith Company to the bill of complaint filed herein. I most emphatically deny that I ever agreed with these complainants or any one else that said stock was accepted by me in full settlement of the accounts of the Keith Company and Lewis A. Crossett, and that I agreed either personally or as agent for the Keith Company to assume and pay to Lewis A. Crossett the balance due on his account. I neither had nor claimed authority to bind Crossett or Keith in any such manner, and I certainly had no reason to bind myself personally to carry out any such agreement.

And further affiant saith not.

GEO. H. LEACH.

Subscribed and sworn to before me, a notary public, this 15th day of November, A. D. 1901.

THOS. F. DOLAN,
[SEAL.] *Notary Public.*

34 *Affidavit of Willard H. Thayer.*

Filed December 3, 1901.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN, GEORGE W. COLDENstroth, Late Co-partners, Trading under the Firm Name of B. A. Waggaman and Company,	Equity. No. 22733, Docket 51.
vs.	
GEORGE E. KEITH COMPANY, a Corporation Organized under the Laws of the State of Massachusetts, — Lewis A. Crossett.	

STATE OF MASSACHUSETTS, *City of Boston,* } *ss:*

Willard H. Thayer being first duly sworn on oath deposes and says: I have for the past nine years occupied — position of credit-

clerk and manager for Lewis A. Crsosett, one of the defendants herein; that my duties included handling the correspondence, looking after the collection of accounts and managing the financial part of the business; that some time in April 1900 I received a telephone message from Mr. Leach, who was in the employ of George E. Keith Company, stating he had just returned from Washington, that while there he had been to see B. A. Waggaman & Company, that he had spent some little time with them, and had agreed to take George E. Keith Company's goods that B. A. Waggaman & Co. had in stock, and to sell them to Edmonston & Co. of Washington, D. C. at 70% of the invoice price, and to credit the net amount of the proceeds to George E. Keith Company's account
35 against B. A. Waggaman & Co., and that said B. A. Waggaman and Co. had also in stock some of the goods of the manufacture of Lewis A. Crossett, and some of the goods of the manufacture of one Heywood, the latter goods having been paid for by B. A. Waggaman & Co., and that Mr. Waggaman requested him (Leach) to take these goods and sell them and turn the net proceeds over to Mr. Crossett to apply on his account; but Mr. Leach said that he refused to do this as he had no authority from Mr. Crossett. At the time I received this telephone message, Mr. Crossett was away. Upon his return I submitted the matter to him, and his instructions were to notify George E. Keith Company or Mr. Leach that if Mr. Waggaman wished it Mr. Crossett was willing the goods should be sold, as suggested, and would accept the amount realized in part payment on his account. Mr. Leach said nothing about the amount realized being accepted by Mr. Crossett in full settlement of the claim, and there was no talk whatever of a compromise. The arrangement was presented as a means of enabling Waggaman & Company to raise some money at once to reduce their indebtedness. I notified Mr. Leach in accordance with Mr. Crossett's instructions, and sometime thereafter, about May 31, 1900, I received from George E. Keith Company $58.16, which was credited as a part payment on Mr. Crossett's account against B. A. Waggaman & Co. Mr. Leach never had any authority from any one to make any representations to the effect that he was authorized to compromise, settle or adjust the account of Mr. Crossett against said B. A. Waggaman & Co. Neither Mr. Crossett or myself ever gave such authority, and if it had been given by any one, I would know of it.

There is now justly due and owing from the said firm of
36 B. A. Waggaman & Co. to Mr. Crossett $273.34, and the same has been overdue and unpaid since May 31, 1900, and suit for the same has been brought and has been pending for nearly a year, and depositions have been taken and the case is now ready for trial, and until about the time suit was brought, I never heard of any such contention as is set up in the bill of complaint filed against Mr. Crossett.

And further affiant saith not.

WILLARD H. THAYER.

Subscribed and sworn to before me, a notary public, this 11th day of November, A. D. 1901.

ALFRED H. NASH,
Notary Public.

[SEAL.]

Motion to Dissolve Injunction.

Filed December 3, 1901.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN, GEORGE W. Coldenstroth, Late Co-partners, Trading under the Firm Name of B. A. Waggaman and Company,
vs.
GEORGE E. KEITH COMPANY, a Corporation Organized under the Laws of the State of Massachusetts, — Lewis A. Crossett.
} In Equity. No. 22733.

Now come the defendants by Ralston & Siddons, their attorneys, and moves the court to dissolve the restraining order passed
37 herein on the 30th day of October 1901, for causes appearing upon the face of the bill of complaint herein, and the answers and affidavits in support thereof filed herewith.

RALSTON & SIDDONS,
EUGENE A. JONES,
Attorneys for Defendants.

Thomas M. Fields, Esq., attorney for complainants:

Please take notice that we shall call the above motion up before Justice Bradley, holding equity court No. 2, on Friday, December 6th, 1901, at ten o'clock a. m., or as soon thereafter as counsel may be heard.

RALSTON & SIDDONS,
EUGENE A. JONES,
Attorneys for Defendants.

Order Overruling Motion.

Filed December 6, 1901.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN ET AL.
vs.
GEORGE E. KEITH CO. ET AL.
} Equity. No. 22733.

Upon consideration of the respondents' motion to dissolve the injunction granted herein on October 30, 1901; and upon considera-

tion of other the record and proceedings herein; and after argument by counsel, for the respective parties; it is this sixth day of December, 1901, ordered as follows:

38 1. That said motion to dissolve be and it is hereby overruled.

2. That said injunction be and it is hereby continued in force until the final hearing of this cause.

By the court:

A. C. BRADLEY, *Justice.*

Replication.

Filed January 6, 1902.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN ET AL. *vs.* GEORGE E. KEITH COMPANY ET AL. } Equity. No. 22733, Docket No. 51.

The complainants join issue on the answers of the respondents in this suit.

THOMAS M. FIELDS,
Solicitor for Complainants.

39 *Stipulation, &c.*

Filed June 14, 1902.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN ET AL. *vs.* GEORGE E. KEITH CO. ET AL. } Equity. No. 22733. Equity Docket No. 51.

It is hereby stipulated and agreed by and between the parties to this suit, by their respective solicitors, that this cause may be finally heard and determined by this court upon the record and proceedings herein, and upon the record and proceedings before A. S. Taylor, late justice of the peace, in the cases before him referred to in the bill of complaint herein, and each and every paper under oath, both in this suit and in said cases before the said justice of the peace, including the answer of the respondent Lewis A. Crossett in this suit, shall be taken and accepted upon the hearing in this court as evidence of the facts therein stated as fully to all intents and purposes as if each and all of the persons who have sworn thereto had been regularly produced and examined, cross-examined and re-examined as witnesses herein, and had in such manner testified to

the matters and things therein set forth; but hereby saving to the parties hereto all proper objections to the relevancy, competency and admissibility of the said matters and things therein stated. It is also hereby stipulated and agreed that each of the persons who has sworn to any papers herein, and in said cases before said justice of the peace, would testify under oath to all of the matters and things in such paper set forth, if regularly produced herein and ex-
40 amined, cross-examined and re-examined as witnesses herein; and that said sworn papers may be used as the depositions, and in lieu of the evidence in any other form, of the said persons, and each of them.

Nothing in this stipulation contained shall be taken as an admission of the truth of any fact controverted in said sworn papers, but the facts of this case shall be found therefrom by the court.

Executed this ninth day of June, A. D. 1902.

RALSTON & SIDDONS,
EUGENE A. JONES,
Solicitors for Respondents.
THOMAS M. FIELDS,
Solicitor for Complainants.

41 *Affidavit of Defense.*

Filed Nov. 30, 1901.

Filed June 14, 1902.

In Justice's Court, Before Anson S. Taylor, Esq., Justice of the Peace in and for the District of Columbia.

GEO. E. KEITH CO.
vs.
BERNARD A. WAGGAMAN and GEO. W. COLDENSTROTH, Trading as B. A. Waggaman & Co. } No. —.

DISTRICT OF COLUMBIA, *ss:*

Bernard A. Waggaman and George W. Coldenstroth, being first duly sworn, depose and say as follows:

That they are the persons upon whom summonses have been served as the defendants in this action; that the said summonses were not prepared, written, signed, tested or issued personally by the justice of the peace whose name appears thereon and subscribed thereto, nor by any other person having power, jurisdiction or authority of law so to do; that these defendants deny that the plaintiff is a legally created or named corporation; that the plaintiff is a non-resident of the District of Columbia, and has not given sufficient security for costs herein as required by the statute in such case made and provided; that the defendant George W. Coldenstroth

has always been truly and correctly called and known by the name of George W. Coldenstroth, and never by the name of "Geo. W. Coldenstroth;". that these defendants traded under the firm name of B. A. Waggaman and Company, and not "B. A. Waggaman & Co.;" that these defendants are not now, and never have
42 been since, to wit, Saturday, April 20, 1900, indebted unto the plaintiff in any sum or amount whatever; that on, to wit, the said April 20, 1900, these defendants were indebted in certain amounts unto the plaintiff and one Lewis A. Crossett on account of certain merchandise, consisting of shoes, theretofore sold and delivered by them to these defendants; that on, to wit, the said April 20, 1900, the plaintiff contracted and agreed with these defendants to take and accept from them certain new shoes, made chiefly by the plaintiff, then the property, and in the possession, of these defendants, and of great value at cost, to wit, nine hundred dollars ($900.00), in full settlement, liquidation, satisfaction and discharge of the said sums then due from these defendants to the plaintiff and the said Lewis A. Crossett, whose debt was to be and was then assumed, and was to be paid and discharged in full by the plaintiff personally; that in strict conformity with the said contract and agreement these defendants, on, to wit, the said April 20, 1900, delivered to the plaintiff the aforesaid merchandise, consisting of shoes, of the value aforesaid, and the plaintiff then and there accepted and received the same in full settlement, liquidation, satisfaction and discharge of its own accounts, and the account of the said Lewis A. Crossett, against these defendants; that the said Lewis A. Crossett, so these defendants expect to prove, became and was, either then or thereafter, and before the filing of this action, a party to and bound by the said contract and agreement; that if the said Lewis A. Crossett never did become a party to or bound by the said contract or agreement, and the plaintiff has failed to fully settle, liquidate, satisfy and discharge the said account of the said Lewis
43 A. Crossett against the defendants, then the plaintiff is justly indebted unto these defendants in the full sum, if any, now due and owing from these defendants to the said Lewis A. Crossett, for which sum, if any, these defendants are entitled to recover from the plaintiff; that the aforesaid contract and agreement, and the full execution and performance thereof by these defendants, constituted a complete accord and satisfaction in law, and a complete account stated and full settlement and satisfaction thereof; that if the said merchandise, so delivered by these defendants and accepted by the plaintiff, as aforesaid, should be of greater value than the aggregate amount of the said two accounts, — so it was agreed, *that* the plaintiff and the said Lewis A. Crossett should retain the surplus to their own use, but if the same should be of less value, then these defendants were not to be held liable for the deficiency; that all of the said merchandise was then and there subject to a landlord's lien for rent, which lien these defendants fully discharged in order to carry out the said contract and agreement on their part.

These defendants further aver that, by reason of the premises, the

said justice of the peace has no jurisdiction of them or the subject matter of this action; that this action should abate; that they are not indebted to the plaintiff in the whole or in any part of the sum claimed herein; and that they deny the plaintiff's right to maintain this action, or to recover any sum whatever from them or either of them.

These defendants further depose and say that they hereby demand a trial by jury of each and all of the issues of fact herein, if the justice of the peace assume jurisdiction of these de-
44 fendants and the subject-matter of this action, and if it be heard or tried upon the merits or any issue or issues of fact.

And further deponents saith not.

BERNARD A. WAGGAMAN.
GEORGE W. COLDENSTROTH.

Subscribed and sworn to before me this thirtieth day of November, A. D. 1900.

A. S. TAYLOR, *J. P.* [SEAL.]

THOMAS M. FIELDS,
Attorney for Defendants.

Affidavit of Defense.

Filed Nov. 30, 1901.

Filed June 14, 1902.

In Justice's Court, Before Anson S. Taylor, Esq., Justice of the Peace in and for the District of Columbia.

LEWIS A. CROSSETT
vs.
BERNARD A. WAGGAMAN and GEO. W. COLDENST-OTH, Trading as B. A. Waggaman & Co. } No. —.

DISTRICT OF COLUMBIA, *ss:*

Bernard A. Waggaman and George W. Coldenstroth, being first duly sworn, depose and say as follows:

That they are the persons upon whom summonses have
45 been served as the defendants in this action; that the said summonses were not prepared, written, signed, tested or issued personally by the justice of the peace whose name appears thereon and subscribed thereto, nor by any other person having power, jurisdiction or authority of law so to do; that the plaintiff is a non-resident of the District of Columbia, and has not given sufficient security for costs herein as required by the statutes in such case made and provided; that the defendant George W. Coldenstroth has always been truly and correctly known and called by the name of George

W. Coldenstroth, and never by the name of "Geo. W. Colden-troth;" that these defendants traded under the firm name of B. A. Waggaman and Company, and not "B. A. Waggaman & Co.;" that these defendants expect to prove that they are not now, and never have been since, to wit, Saturday, April 20, 1900, indebted to the plaintiff in any sum or amount whatever; that on, to wit, the said April 20, 1900, these defendants were indebted in certain amounts unto the plaintiff and a certain George E. Keith Company on account of certain merchandise, consisting of shoes, theretofore sold and delivered by them to these defendants; that, on to wit, the said April 20, 1900, the said George E. Keith Company contracted and agreed with these defendants to take and accept from them certain new shoes then the property, and in the possession of, these defendants, and of great value, at cost, to wit nine hundred dollars ($900.00), in full settlement, liquidation, satisfaction and discharge of the said sums then due from these defendants to the plaintiff and the said George E. Keith Company, which was to, and did then personally assume and agree to pay and discharge in full the said debt then due from these defendants to the plaintiff; that in strict conformity
46 with the said contract or agreement these defendants on, to wit, the said April 20, 1900, delivered to the said George E. Keith Company the aforesaid merchandise, consisting of shoes, of the value aforesaid, and the said George E. Keith Company then and there accepted and received the same in full settlement, liquidation, satisfaction and discharge of its own account, and the account of the plaintiff, against these defendants; that the plaintiff, so these defendants expect to prove, became and was, either then or thereafter, and before the filing of this action, a party to and bound by the said contract and agreement; that if the said George E. Keith Company has failed to fully settle, liquidate, satisfy and discharge the said account of the plaintiff against these defendants, then the plaintiff's right of action is against the said George E. Keith Company, and not against these defendants, and the said George E. Keith Company is justly indebted unto the plaintiff in the full sum, if any, now due and owing to him on account of the said indebtedness formerly due to him from these defendants; that the aforesaid contract and agreement, and the full execution and performance thereof by these defendants, constituted a complete accord and satisfaction in law, and a complete account stated and full settlement and satisfaction thereof; that if the said merchandise, so delivered by these defendants and accepted by the said George E. Keith Company, as aforesaid, should be of greater value than the aggregate amount of the said two accounts, then, so it was agreed, the plaintiff and the said George E. Keith Company should retain the surplus to their own use; but if the same should be of less value, then these
47 defendants were not to be held liable for the deficiency; and that all of the said merchandise was then and there subject to a landlord's lien for rents, which lien these defendants fully discharged in order to carry out the said contract or agreement on their part.

These defendants further aver, that, by reason of the premises, the said justice of the peace has no jurisdiction of them or the subject-matter of this action; that this action should abate; that they are not indebted to the plaintiff in the whole or in any part of the sum claimed herein; and that they deny the plaintiff's right to maintain this action, or to recover any sum whatever from them, or either of them.

These defendants further say that if the plaintiff never did become a party to or bound by the said contract and agreement, then these defendants are indebted to him in the full sum of three hundred and thirty-one and .50/100 dollars ($331.50), and not in the sum claimed herein; for which reason the justice of the peace would not have jurisdiction of the sum due to the plaintiff; and for that the plaintiff cannot voluntarily split or reduce the real amount of his claim merely for the purpose of bringing the same within the jurisdiction of the justice of the peace.

These defendants further depose and say that they hereby demand a trial by jury of each and all of the issues of fact herein; if the justice of the peace assume jurisdiction of these defendants and the subject-matter of this action, and if it be heard or tried upon the merits of any issue or issues of fact.

And further deponents saith not.

BERNARD A. WAGGAMAN.
GEORGE W. COLDENSTROTH.

48 Subscribed and sworn to before me this thirtieth day of November, A. D. 1900.

A. S. TAYLOR, *J. P.* [SEAL.]

THOMAS M. FIELDS,
Attorney for Defendants.

Interrogatories Propounded to George H. Leech.

Filed June 14, 1902.

In the Justice's Court of the District of Columbia, Before A. S. Taylor, Justice of the Peace.

GEORGE E. KEITH CO.
vs.
GEORGE W. COLDENSTROTH & BERNARD A. WAGGAMAN, Lately Trading as B. A. Waggaman & Company.

Interrogatories to be propounded to George H. Leech, a witness on behalf of the plaintiffs herewith.

1. State your full name, age and occupation.
2. How long have you occupied your present position?
3. State whether or not the plaintiff is a corporation.

4. If you answer yes to question No. 3 attach to your deposition a certified copy of the charter under the seal of the State granting it; or if the plaintiff is incorporated under a general enabling statute so state giving name and date of same and file with your deposition
49 the original agreement of incorporation executed in compliance with the statute or a certified copy thereof if the statute makes it evidence.

5. Are you personally acquainted with the defendants or either of them? If yes state when and where you became acquainted with them.

6. State whether or not on April 19, 1900, or thereabouts you presented to the defendants or either of them a statement of an account of the plaintiff against the defendants for goods, wares and merchandise sold and delivered by the plaintiff to the defendants.

7. If you answer yes to the next preceding question state whether or not the defendants or either of them promised to pay it or admitted it to be correct, and the balance shown on said statement.

8. State whether or not you entered into any arrangement, contract or agreement with the defendants or either of them with a view to the adjustment of accounts and if so set forth the agreement in full, and what action if any was taken under it.

9. What amount if any is now due and owing by the defendants to the plaintiff by reason of the premises exclusive of all set-offs and just grounds of defense?

10. If you say that the defendants are still indebted to the plaintiffs state whether or not they or either of them either personally or through their attorney, Thomas M. Fields, have ever promised that the same should be settled.

11. State whether or not you ever accepted any goods, wares, merchandise, money or security in full satisfaction of the account of plaintiff against defendants.

50 12. State whether or not you ever had or claimed authority to accept a compromise of the matters here in dispute or to accept goods or security in full settlement thereof.

13. State any other matters fully, which are within your personal knowledge and which bear upon the issue in this case.

Answer to first interrogatory:

George H. Leach. Age 23. Occupation, assistant credit clerk for George E. Keith Co.

Answer to second interrogatory:

Three years.

Answer to third interrogatory:

Plaintiff is a corporation.

Answer to fourth interrogatory:

I hand to the magistrate to be attached to my deposition, a certified copy of the charter under the seal of the secretary of state of Massachusetts.

(Certified copy of charter attached and marked "Exhibit A." Thomas F. Dolan, notary public.)

Answer to fifth interrogatoy:

I am personally acquainted with the defendants in this case. I met Mr. Waggaman on Friday, April 20, 1900 at his store. I met Mr. Coldenstroth on Friday or Saturday, April 20th, or April 21, 1900, at his place of business in Washington.

Answer to sixth interrogatory:

I did.

Answer to seventh interrogatory:

Bernard Waggaman admitted it to be correct, except that
51 there should be deducted a credit for the amount of $31.10, a claim for expressage, leaving balance which he admitted was due the George E. Keith Co. of $541.80.

Answer to eighth interrogatory:

I agreed with Mr. Waggaman, acting with the consent and advice of his partner, Mr. Coldenstroth, and their attorney, Mr. Fields, to take off his hands such part of his stock of boots and shoes as was supplied by the George E. Keith Co., and ship said George E. Keith Co.'s goods to Campello to be sold at the best possible price, the net proceeds of sale to be credited to his account with said George E. Keith Co. In conversation I stated that this sale would probably realize about 70% of the invoice price. After I had arranged with the transportation company to take and ship the goods to Campello, Mr. Betz, buyer for Edmonston & Co. shoe dealers in Washington, called at the store of defendants where Mr. Waggaman and I were engaged in stacking up the George E. Keith Co.'s goods preparatory to boxing them for shipment, and stated that he had heard that the stock was to be disposed of and called with the idea of buying it. After some talk in regard to price, Mr. Betz agreed to take all of the George E. Keith Co.'s goods at 70% of the invoice price. At this juncture Mr. Betz inquired about the balance of the stock, which in the shoe line was made up of certain goods made by Lewis A. Crossett and one Heywood, according to the statement of Mr.
Waggaman. I told Mr. Betz that I had nothing to do with
52 these goods and had only authority to act in behalf of the George E. Keith Co. Mr. Betz was anxious to take the entire stock, and with Mr. Waggaman's consent, the entire shoe stock of the defendants was delivered to Edmonston & Co. on Saturday, April 21, 1900, with the understanding between myself, Mr. Betz and Mr. Waggaman, that the goods of other manufacturers should be sold for 70% also, provided Mr. Crossett consented to the arrangement.

Answer to ninth interrogatory:

$36.67.

Answer to tenth interrogatory:

Mr. Waggaman personally and Mr. Fields and Mr. Waggaman together, acknowledged the balance and promised that same should be settled. At the conference at Mr. Fields' residence I suggested that they give me a note to cover balance, but they said that the lease settlement might demand ready cash and they did not want to feel that they must pay a certain sum at a certain time on that account.

Answer to eleventh interrogatory:

I have not.

Answer to twelfth interrogatory:

I never had nor claimed authority to accept a compromise of the matters here in dispute, or to accept goods or security in full settlement.

Answer to thirteenth interrogatory:

I wish to say that from the sale of George E. Keith Co.'s goods to Edmonston & Co. said George E. Keith Co. received $480.13, and from the sale of goods manufactured by one Heywood, which
53 were also sold to Edmonston & Co., the said George E. Keith Co. received $25., making a total credit to apply on George E. Keith Co.'s claim against B. A. Waggaman & Co. of $505.13, leaving a balance of $36.67. I hand to the magistrate to be attached to my deposition, a letter written by Mr. B. A. Waggaman under date of June 5, 1900, to Mr. D. Cary Keith, treasurer of the George E. Keith Co., in which he admits that there is a balance due said George E. Keith Co. and promises to settle same as soon as they got through with the lease question. (Letter attached and marked "Exhibit B." Thomas F. Dolan, notary public.)

GEO. H. LEACH.

54 In Justice's Court, before Anson S. Taylor, Esq., Justice of the Peace in and for the District of Columbia.

GEO. E. KEITH CO.
vs.
BERNARD A. WAGGAMAN ET AL. } No. 47887.

Come here now the defendants, and, expressly reserving all objections heretofore taken by them in this action, object to the issuance of the commission to take depositions moved for by the plaintiff for that:

1. The justice has no power or jurisdiction to issue such commission.

2. No sufficient cause has been shown for the issuance of such commission.

These defendants repeat their demand for a trial of this action by the common law jury provided for by the seventh amendment to the Constitution of the United States.

Hereby expressly reserving all former objections heretofore made by them herein, these defendants object to the several direct interrogatories herein for the reasons following:

1. They object to interrogatory No. 6 for that the same is leading.

2. They object to interrogatory No. 7 for that the same is leading.

3. They object to interrogatory No. 8 for that the same is leading and may call for a parol statement of the contents of a written instrument.

55 4. They object to interrogatory No. 10 for that the same is leading.

5. They object to interrogatory No. 11 for that the same is leading.

6. They object to interrogatory No. 12 for that the same is leading, and calls for incompetent, irrelevant and immaterial matters.

7. They object to interrogatory No. 13 for that the same is insufficient, in substance and form; and too limited in its scope.

Hereby expressly reserving all former objections heretofore made by them herein, these defendants hereby propound the following cross-interrogatories to the GEORGE H. LEECH named in the aforesaid motion:

1. Were you in the employ of the plaintiff during the month of April 1900, and if so, in what capacity?

2. Did you receive any goods and merchandise, and if so what kind, from the defendants, or either of them, during the month of April 1900, for or on account of the plaintiff?

3. During the month aforesaid how many pairs of shoes did you receive from the defendants, or either of them, for the plaintiff, and what was their value at cost and their selling value at retail?

4. How many pairs of said shoes were of your own make?

5. How many pairs were of others'—and whose—make?

6. Why were other makers' goods then turned over to you by the defendants?

7. Did you then know Lewis A. Crossett, and that the defendants then owed him $331.50?

8. Did you call with the defendant Bernard A. Waggaman
56 during the month aforesaid, upon the defendant's counsel at his residence, and then and there consult with said counsel and said Waggaman in regard to the defendants' turning over to you for the plaintiff all of their stock of goods and merchandise, consisting of shoes, then in the defendants' store?

9. Was a final agreement reached between you and the defendants and their counsel at said interview?

10. Was such agreement carried out by the defendants, and did they deliver said goods to you thereunder, and if so did they deliver them to you on the same day such agreement was reached?

11. Has the plaintiff received said goods or their proceeds, or any part thereof, and have the same, or any part thereof, been credited by the plaintiff on the account then held by the plaintiff against the defendants, and if so to what extent?

12. Who sold said goods, or any part thereof, to the defendants?

13. In what books, if any, did and does the plaintiff's account against the defendants appear?

14. Who made the entries in such books?

15. When were such entries made?

16. Where were said goods sold to the defendants?

17. If said goods were sold to the defendants by an agent of the plaintiff, and such sale or sales were made in the District of Columbia, who was such agent, did he make any entry regarding the same, and if so in what book, when, and where?

18. Before and on the day of the aforesaid interview between you, the defendant Waggaman, and the defendants' counsel,
57 did you personally see and talk with the defendant Coldenstroth in his place of business about the defendants' turning over said goods to you for the plaintiff?

19. If you presented to the defendants a statements of account as mentioned in direct interrogatory No. 6, where is such statement? If you have it, please produce it and attach the same to your answer to this cross-interrogatory.

20. Has the plaintiff paid the aforesaid Lewis A. Crossett the sum of $331.50, due to him, during the month aforesaid, from the defendants, in whole or in part, and if only in part, what part?

21. Has the plaintiff in any other way than by payment or payments of money satisfied or discharged in whole or in part, the said account of $331.50 of the said Lewis A. Crossett against the defendants which they owed him during the month aforesaid, and if in part, what part?

22. Was the said Crossett informed of the said agreement and did he consent thereto or ratify the same?

THOMAS M. FIELDS,
Attorney for Defendants.

Answer to first cross-interrogatory:

During the month of April 1900, I was in the employ of George E. Keith Co. in the capacity of assistant credit clerk.

Answer to second cross-interrogatory:

I did receive from defendants 270 pairs of shoes manufactured by George E. Keith Co. during the month of April, 1900.

58 Answer to third cross-interrogatory:

270 pairs of shoes. Cost price $685.90, and retail price, according to the letter head of defendants is $3.50 per pair, or a total of $945.

Answer to fourth cross-interrogatory:

All of the 270 pairs.

Answer to fifth cross-interrogatory:

I accepted no goods whatever other than those manufactured by the George E. Keith Co.

Answer to sixth cross-interrogatory:

Other makers' goods were not turned over to me by the defendants.

Answer to seventh cross-interrogatory:

I did not know Lewis A. Crossett personally at the time the George E. Keith Co.'s goods were turned over to me, but at that time I was informed by Mr. Waggaman that Lewis A. Crossett was a creditor, but he did not state the exact amount of the indebtedness.

Answer to eighth cross-interrogatory:

I did call with Bernard A. Waggaman during the month aforesaid upon defendants' counsel at his residence, and consulted with said counsel and Waggaman in regard to defendants' turning over to me for the George E. Keith Co. such part of defendants' stock as

was manufactured by the George E. Keith Co. then in the defendants' store, but no mention at said conference was made with reference to turning over to me goods manufactured by Lewis A. Crossett or any other manufacturer other than those manufactured by the George E. Keith Co.

Answer to ninth cross-interrogatory:

A final agreement was reached between myself and the
59 defendants and their counsel at said interview, the agreement being that the said George E. Keith Co. goods should be turned over to me to be shipped by me back to Campello, with the understanding that after the goods were disposed of the net proceeds of the sale thereof would be credited to B. A. Waggaman & Co.'s account with the George E. Keith Co.

Answer to tenth cross interrogatory:

The agreement was carried out by the defendants and the goods delivered by them to me on the day the agreement was made.

Answer to eleventh cross-interrogatory:

As previously testified to, plaintiffs have received proceeds of its goods, $480.13 together with $25 representing proceeds of sale of Heywood goods, making a total payment of $505.13 which has been credited on defendants' account.

Answer to cross interrogatory twelve:

A. H. Jenkins, travelling salesman for George E. Keith Co. sold part of the goods and the balance was sold to defendants on the orders received direct from defendants by mail.

Answer to thirteenth cross interrogatory:

In the order books, invoice books and ledgers of the George E. Keith Co. appears the account of George E. Keith Co. against the defendants.

Answer to fourteenth cross-interrogatory:

The entries in the order books we- made by the order clerk; the entries in the invoice books were made by the invoice clerk, and the entries in the ledgers were made by the bookkeeper.

60 Answer to fifteenth cross-interrogatory:

These orders were entered in our order books about September 6th, September 28th, October 10th, October 15th, October 24th, November 8th, November 21st, December 15th, 1899 and March 6th, 1900, respectively, and debits for these several items were copied in our invoice books on the day of shipment or the next business day following, in each case. Shipments were made on September 29th, September 30th, October 2nd, October 28th, November 6th, November 10th, November 13th, November 17th, December 9th, December 13th, December 19th, 1899 and January 1st, and March 17th, 1900. The several items were posted from invoice books to ledgers in from one to five days after date of shipment in each instance.

Answer to sixteenth cross-interrogatory:

Part of them were sold to the defendants by a travelling salesman for George E. Keith Co. in Washington, and a part of them were sold in Campello.

Answer to seventeenth cross-interrogatory:

A. H. Jenkins. The sales were entered in his order book at the time the order was taken in Washington.

Answer to eighteenth cross-interrogatory:

I did.

Answer to nineteenth cross-interrogatory:

I have not in my possession at this time the identical statement that I presented to the defendants, but I hand to the magistrate to be attached to my deposition, an exact copy of said statement. (Statement attached and marked "Exhibit C," Thomas F. Dolan, notary public.) From this statement, however, is to be de-
61 ducted the amount of allowance claimed by B. A. Waggaman & Co. for express charges, to wit: $31.10.

Answer to twentieth cross-interrogatory:

The George E. Keith Co. paid Lewis A. Crossett the sum of $58.16 which represented a part payment of said Lewis A. Crossett's account, against B. A. Waggaman & Co.

Answer to twenty-first cross-interrogatory:

It has not. As stated, plaintiff has paid Lewis A. Crossett $58.16 to apply on his account.

Answer to twenty-second cross-interrogatory:

When I returned from Washington, I advised Mr. Crossett's representative of the arrangement which I had made with B. A, Waggaman & Co. and their counsel in relation to the disposition of the George E. Keith Co.'s goods, and I also told him about the arrangement which could be made in relation to disposing of Mr. Crossett's goods to Edmonston & Co. on the basis of 70% of their invoice value, and Mr. Crossett's representative consented to have Mr. Crossett's goods sold to Edmonston & Co. on that basis, with the distinct understanding that the net proceeds only should be credited on B. A. Waggaman & Co.'- indebtedness to Mr. Crossett.

GEO. H. LEACH.

62 "EXHIBIT B."

$3.50. Every pair guaranteed.

B. A. Waggaman & Co., 1311 F St. N. W.

Received Jun- 11, 1900.

Ans. —.

Room 11 Phœnix bldg.

WASHINGTON, D. C., *June 4th*, 1900.

Mr. D. Carry Keith, Campello, Mass.

DEAR SIR: I have received a letter from your firm in regards to the balance due your firm for good- we received, and will say, that we will settle it alright as soon as we get through with the lease question, at present it look- as if we will have to pay the rent, it

is in the hand of our lawyer. I have started a custom shoe dep't in the Phœnix bldg. with Mr. Jasper, late manager for the Regal shoe in this city, and we are taking orders on the outside for custom work and also for your good- and we have been doing good business with the Emerson firm on a 5 % and 10 % basis, now what we would like to do, would be for you to send us some sample and send us the good- we would order to us C. O. D. with your goods, we know we could do a good business and send you some good order, hoping to have a favorable replay, from you

I am sir your- resp., B. A. WAGGAMAN.

P. S.—Please send me a pair of lot 202 enamel size 7 c at once C. O. D. $2 60.

63 "EXHIBIT C."

CAMPELLO, MASS., U. S. A., *April* 19, 1900.

M-. B. A. Waggaman & Co., Washington, D. C., to Geo. E. Keith Company, Dr.

Terms: 1 off 30; net, 60 days.

Nov. 17.	To mdse.....	386.05	
Dec. 19.	.....	174.20	
Jan. 1.	....	3.20	
Mc'h 17.	.....	9.45	
		———	572.90

64 *Interrogatories Propounded to Wm. H. Thayer.*

Filed June 14, 1902.

In the Justice's Court of the District of Columbia, Before A. S. Taylor, Justice of the Peace.

LEWIS A. CROSSETT
vs.
GEORGE W. COLDENSTROTH & BERNARD A. WAGGAMAN, Lately Trading as B. A. Waggaman & Company.

1. State your full name, age and occupation?
2. How long have you occupied your present position?
3. State whether or not there appears on the books of the plaintiff herein an account against the defendants in this suit.
4. If you say there is state the amount of the balance shown to be due.
5. Turn to your books of original entry and state item for item the debits and credits having reference to said account from its beginning down to the present time.

6. State whether or not these entries were made by yourself and in the usual course of your employment.

7. If you find among the items of credit any items crediting the account with proceeds of sales or merchandise, give date thereof and explain them fully.

8. What amount (if any) is now due and owing by the defendants to the plaintiff exclusive of all set-offs and just grounds of defense?

9. If you have personal knowledge of any other matters bearing upon the issue herein state fully.

65 Answer to first interrogatory:

Willard H. Thayer, age 29. Occupation, credit clerk and manager of office for Lewis A. Crossett.

Answer to second interrogatory:

About eight years.

Answer to third interrogatory:

There is on the books of Lewis A. Crossett an account against B. A. Waggaman & Co.

Answer to fourth interrogatory:

$273.34.

Answer to fifth interrogatory:

I do not know just what you mean by "books of original entry," but as you refer to "debits and credits," I suppose you mean the ledger, and on the ledger the account stands as follows: Nov. 25, 1899, debit to merchandise, $331.50 ($40 to date from April 1, 1900). The $40 referred to were goods upon which they were entitled to spring dating. There is a credit under date May 31, 1900. by proceeds from goods sold $58.16, thus leaving a balance still due on the account $273.34.

Answer to sixth interrogatory:

These entries were not made by me personally, but by the bookkeeper, H. N. Thomas.

Answer to seventh interrogatory:

Under date of May 31, 1900, I find a credit of $58.16, being net proceeds from goods sold to Edmonston & Co. The explanation of this credit is as follows: Sometime in April, 1900, after I had mailed the account of B. A. Waggaman & Co. to National Shoe and Leather Exchange for collection, Mr. Leach, with George E. Keith Co., telephoned me that he had just returned from Washington,

66 D. C.; that he had been to see B. A. Waggaman & Co. of that city. He said that he had spent some little time with them and had agreed to take George E. Keith Co.'s goods that B. A. Waggaman & Co. had in stock and to sell them to Edmonston & Co. Washington, D. C., at 70 % of the invoice price, and to credit the net amount of the proceeds to George E. Keith Co.'s account against B. A. Waggaman & Co. He also said that B. A. Waggaman & Co. had some of Lewis A. Crossett's goods in stock (about 18 pairs), and about 29 pairs of shoes made by one Heywood, which had been paid for by B. A. Waggaman & Co., and that Mr. Waggaman requested him (Mr. Leach) to take these goods and sell them and turn

the proceeds over to Mr. Crossett to apply on his account, but Mr. Leach said that he refused to do this as he had no authority from Mr. Crossett; in fact, neither I nor Mr. Crossett knew anything about Mr. Leach's trip until after he had returned and advised us by telephone. Mr. Crossett was away at the time and I did the talking over the telephone with Mr. Leach. Mr. Leach further said that he had made no agreement whatsoever except that he would notify Mr. Crossett of Mr. Waggaman's wishes when he reached home. I conferred with Mr. Crossett and his instructions were, to notify George E. Keith Co. that if Mr. Waggaman wished, he (Mr. Crossett) would agree to let Edmonston & Co. have the goods referred to (about 47 pairs) at 70 % of the invoice price, and he (Mr. Crossett) would credit the net amount realized to the account of B. A. Waggaman & Co. This was agreed with the explicit understanding that this would not settle any part of the account except as a part payment on account.

Answer to eighth interrogatory:

There is still due Lewis A. Crossett on the account $273.34.

67 Answer to ninth interrogatory:

In the talk with Mr. Leach in regard to this matter it was understood beyond all question that the net amount realized from these goods (about 47 pairs), if Mr. Crossett should agree to sell them to Edmonston & Co. or anybody else, should be credited to the account of B. A. Waggaman & Co., and with the understanding that B. A. Waggaman & Co. would pay the balance of the account as soon as they could do so. It was also expressly understood that this transaction did not in any way release or discharge B. A. Waggaman & Co., and that they would receive no credit except for the net amount realized on the sale of said goods.

WILLARD H. THAYER.

68 In Justice's Court, Before Anson S. Taylor, Esq., Justice of the Peace in and for the District of Columbia.

LEWIS A. CROSSETT
vs.
BERNARD A. WAGGAMAN ET AL. } No. 47888.

Come here now the defendants, and, expressly reserving all objections heretofore taken by them in this action, object to the issuance of the commission to take depositions moved for by the plaintiff for that:

1. The justice has no power or jurisdiction to issue such commission.

2. No sufficient cause has been shown for the issuance of such commission.

These defendants repeat their demand for a trial of this action by the common law jury provided for by the seventh amendment to the Constitution of the United States.

Hereby expressly reserving all former objections heretofore taken by them herein, these defendants hereby object to the several direct interrogatories as follows:

WILLIAM H. THAYER.

1. They object to interrogatory No. 3 because it calls for secondary evidence, the books themselves being the primary evidence of their contents; and for that the same is leading.

2. They object to interrogatory No. 4 because it calls for secondary evidence.

3. They object to interrogatory No. 5 because it assumes
69 that the books referred to exist, and that they are books of original entry.

4. They object to interrogatory No. 6 because it is leading.

5. They object to interrogatory No. 7 because it assumes that items of credit exist, and for that it calls for secondary evidence.

6. They object to interrogatory No. 9 because it is insufficient in form and substance, and too limited in its scope.

LEWIS A. CROSSETT.

1. They object to interrogatory No. 2 because it is leading.

2. They object to interrogatory No. 3 because it is insufficient in form and substance, and too limited in its scope.

GEORGE H. LEECH.

1. They object to interrogatory No. 3 because it is leading.

2. They object to interrogatory No. 4 because it is leading.

3. They object to interrogatory No. 5 because it is leading, and because it calls for incompetent, irrelevant and immaterial matters.

4. They object to interrogatory No. 6 because it is leading.

5. They object to interrogatory No. 7 because it is insufficient in form and substance, and too limited in its scope.

Hereby reserving all former objections by them heretofore taken herein, these defendants hereby propound the following cross-interrogatories to the said witnesses:

70 *Cross-interrogatories.*

WILLIAM H. THAYER.

1. In how many, and in what books, does the plaintiff's account, or any part of it, appear?

2. Did this account ever originally appear, in whole or in part, in any sheets, pass-books, slips, order-books, blotters, or any other paper or papers, and if so, in what, and where is or are the same?

3. Who made any and all entries relating to this account?
4. When were such entries made?
5. What is an original entry or a book of original entry?
6. To what book or books do you refer in answer to your direct-interrogatories?
7. If you refer to a ledger or ledgers, from what source were the entries in it or them derived, and by whom and when were they made?
8. Have you any personal knowledge as to the balance alleged to be due to the plaintiff from the defendants, apart from your books, and if so, what?

Answer to first cross interrogatory:

The account appears in the ledger, also in the collection book. Besides this, of course the bill was copied into the sales book.

Answer to second cross interrogatory:

The account, that is when reduced to dollars and cents, did not ever appear in any sheets, pass-books, slips, order books, blotters, or any other papers except as mentioned in answer to first cross-interrogatory, but the order giving description of the shoes with price, etc., was copied in an order book.

71 Answer to third cross-interrogatory:

The invoice was copied from the order by Miss H. E. Cobb, afterwards copied into the sales book by Joseph L. Wilkes, and posted from the sales book into the ledger and also into the collection book by H. N. Thomas.

Answer to fourth cross interrogatory:

The invoice was made out and copied into the sales book on November 25, 1899, and probably posted to the ledger and to the collection book on the next morning.

Answer to fifth cross interrogatory:

I do not know what the technical definition of "original entry" is, as "original" means first, I suppose the sales book would be the book of "original entry" for the account, but the order book would be the book of "original entry" of the order.

Answer to sixth cross interrogatory:

I referred to the ledger.

Answer to seventh cross interrogatory:

As I have previously described, the invoice was made out from the order and then copied into the sales book with damp tissue, giving exact copy, and then posted from the sales book into the ledger and also into the collection book. The invoice was made out by Miss H. E. Cobb, the copying into the sales book done by Joseph L. Wilkes, and the posting into the ledger and into the collection book by H. N. Thomas.

Answer to eighth cross-interrogatory:

I know that these goods, amounting to $331.50 were shipped to B. A. Waggaman & Co., and that to date Mr. Crossett has received but $58.16 from the account. I also have personal knowledge of the other matters stated in this whole deposition of mine.

WILLARD H. THAYER.

72 *Interrogatories Propounded to Lewis A. Crossett.*

In the Justice's Court of the District of Columbia, Before A. S. Taylor, Justice of the Peace.

LEWIS A. CROSSETT
vs.
GEORGE W. COLDENSTROTH & BERNARD A. WAGGAMAN, Lately Trading as B. A. Waggaman & Company.

1. State your name, age and occupation and whether or not you are the plaintiff in this suit.

2. State whether or not you or any one by your authority ever authorized George H. Leech or any other person to compromise or settle your account against the defendants herein.

3. If you have personal knowledge of any other matters bearing upon the issue herein state full-.

Answer to first interrogatory:

Lewis A. Crossett. Age 41. Occupation show manufacturer. I am the plaintiff in this suit.

Answer to second interrogatory:

No.

Answer to third interrogatory:

I have no personal knowledge whatever of any other matters bearing upon the issue herein, as all negotiations and arrangements in my behalf were made by my duly authorized representative, Willard H. Thayer.

LEWIS A. CROSSETT.

73 *Cross-interrogatories.*

LEWIS A. CROSSETT.

1. What, if anything, have you received from the Geo. E. Keith Co. on account of your claim of $331.50, which you held against the defendants in April 1900?

2. If you received anything from the Geo. E. Keith Co., how much did you receive, when and why did you receive it?

3. If you received anything from the said Geo. E. Keith Co., did you credit it on the defendants' account, and if so, when and to what extent?

4. Why and for what purpose did you place your account of $331.50 against the defendants in the hands of George H. Leech in April, 1900?

5. When and from whom did said Leech get your account against the defendants in April, 1900.

6. When and from whom and in what manner did you first learn

that the defendants' entire stock in trade was to be and had been turned over to said Leech by the defendants?

7. Was the payment which was made to you on account of your claim of $331.50, against the defendants, by the Geo. E. Keith Co., made by check, draft, exchange, or currency, or in some other mode, and if so what?

8. If said payment was made by any instrument of writing, who was the maker or drawer of such instrument?

9. From what source and when did the Geo. E. Keith Co., or you, derive the credit given after April, 1900, on your account of $331.50 against the defendants?

10. Where did the goods or money representing such credit come from, and when did you receive the same?

11. Why did not this credit appear on your account when
74 you first sent it to your counsel here?

Answer to first cross-interrogatory:

My books show that I received $58.16 to apply on my claim against the defendants.

Answer to second cross-interrogatory:

As stated, I received from George E. Keith Co., $58.16 on May 31, 1900. It was received to apply on B. A. Waggaman & Co.'s account.

Answer to third cross-interrogatory:

I did, as heretofore testified to, credit the amount received from George E. Keith Co. to wit: $58.16 on the defendants' account.

Answer to fourth cross-interrogatory:

I did not place my account against the defendants in the hands of George H. Leach in April, 1900, or at any other time.

Answer to fifth cross-interrogatory:

He never received my account against the defendants from me or anyone else.

Answer to sixth cross-interrogatory:

I have never learned from anyone that the defendants' entire stock in trade had been or was to be turned over to said George H. Leach.

Answer to seventh cross-interrogatory:

My books show that the payment made by George E. Keith Co. to apply on my account against defendants was in the form of a check drawn by said George E. Keith Co. payable to my order.

Answer to eighth cross-interrogatory:

The George E. Keith Co. was the maker of the check cov-
75 ering said remittance.

Answer to ninth cross-interrogatory:

My records show that when the George E. Keith Co. sent me its check for $58.16, the explanation accompanying same was that it represented the net proceeds of the sale to Edmonston & Co. of the goods from the stock of B. A. Waggaman & Co. other than those of the manufacture of said George E. Keith Co. to be credited on my account against defendants.

Answer to tenth cross-interrogatory:

As previously testified to, the money representing said credit was received by me from George E. Keith Co.

Answer to eleventh cross-interrogatory:

The reason this credit did not appear on the account when I first sent it to my counsel, was that the account was sent by me to counsel for collection on April 21, 1900 and the remittance was not received by me until May 31, 1900.

LEWIS A. CROSSETT.

76 *Interrogatories Propounded to George H. Leech.*[a]

In the Justice's Court of the District of Columbia, Before A. S. Taylor, Justice of the Peace.

LEWIS A. CROSSETT
vs.
GEORGE W. COLDENSTROTH & BERNARD A. WAGGAMAN, Lately Trading as B. A. Waggaman & Company.

1. State your full name, age and occupation and how long so employed.

2. Do you know the plaintiff and defendants herein?

3. State whether or not on April 19, 1900, or thereabouts you presented to the defendants or either of them a statement of an account of the plaintiff against the defendants for goods, wares and merchandise sold and delivered by the plaintiff to the defendants.

4. If you answer yes to the next preceding question state whether or not the defendants or either of them promised to pay it or admitted it to be correct, and the balance shown on said statement.

5. State whether or not you ever had or claimed authority to accept a compromise of the matters here in dispute or to accept goods or security in full settlement thereof.

6. State whether or not you ever accepted any goods, wares, merchandise money or security in full satisfaction of the account of plaintiff against defendants.

7. State any other matters fully, which are within your
77 personal knowledge and which bear upon the issue in this case.

Answer to first interrogatory:

George H. Leach. Age 23. Occupation, assistant credit clerk for George E. Keith Co. and have been employed in that capacity three years.

Answer to second interrogatory:

I do.

Answer to third interrogatory:

I did not.

Answer to fourth interrogatory:

As previously stated, I did not present plaintiff's statement to defendants.

Answer to fifth interrogatory:

I never had authority or claimed authority to accept a compromise of the matters here in dispute, nor to accept goods or security in full settlement thereof.

Answer to sixth interrogatory:

I did not.

Answer to seventh interrogatory:

Until I reached Washington on April 19, 1900 I did not know that Lewis A. Crossett was a creditor of the defendants, and as stated at no time I represented or claimed to represent Lewis A. Crossett in any way. At the time that the buyer for Edmonston & Co. looked over the George E. Keith Co.'s goods then lying in store of defendants, no further sale was intended, but this buyer noticed other goods and inquired if they too might not be purchased. Among said goods were some belonging to the plaintiff and a certain other lot said to be manufactured by one Heywood. The buyer for Edmonston & Co.
78 was anxious to take these goods also, and Mr. Waggaman requested me to ascertain from Lewis A. Crossett if he was willing to sell his goods to Edmonston & Co. and credit proceeds of the sale to their (B. A. Waggaman & Co.'s) account. I agreed to confer with Mr. Crossett, which I did, and he, or rather his representative, authorized the sale of the goods with said understanding, to wit: that the proceeds of said sale of Mr. Crossett's goods were to be applied to the indebtedness of Mr. Crossett's account against B. A. Waggaman & Co. After this arrangement was made as to the disposition of the goods other than those manufactured by George E. Keith Co., I made out at the special request of Mr. Betz, the buyer for Edmonston & Co., a complete invoice covering all of the George E. Keith Co.'s goods, together with those manufactured by Lewis A. Crossett and said Heywood. On said invoice, however, I separated the goods made by manufacturers other than the George E. Keith Co. for the purpose of designating the different lots, and my recollection now is that on said invoice I marked the lots of goods manufactured by said Lewis A. Crossett and said Heywood.

GEO. H. LEACH.

Cross-interrogatories.

GEORGE H. LEECH.

1. Were you in the employ of the plaintiff or the Geo. E. Keith Co. during the month of April, 1900, and if so in what capacity?
79 2. Did you receive any goods and merchandise, and if so what kind, from the defendants, or either of them, during the month of April, 1900, for or on account of the plaintiff or the Geo. E. Keith Co.

3. During the month aforesaid how many pairs of shoes did you receive from the defendants, or either of them, for the plaintiff or the Geo. E. Keith Co., and what was their value at cost and their selling value at retail?

4. How many pairs of shoes were of the Geo. E. Keith Co.'s make?

5. How many pairs were of others'—and whose—make?

6. Why were other maker's goods then turned over to you by the defendants?

7. Did you then know Lewis A. Crossett, and that the defendants then owed him $331.50?

8. Did you call with the defendant Bernard A. Waggaman, during the month aforesaid, upon the defendants' counsel at his residence, and then and there consult with said counsel and said Waggaman in regard to the defendants turning over to you for the plaintiff or the Geo. E. Keith Co. all of their stock of goods and merchandise, consisting of shoes, then in the defendants' store?

9. Was a final agreement reached between you and the defendants and their counsel at said interview?

10. Was such agreement carried out by the defendants, and did they deliver said goods to you thereunder, and if so did they deliver them to you on the same day such agreement was reached?

11. Has the plaintiff received said goods or their proceeds, or any part thereof, and have the same, or any part thereof, been credited by the plaintiff on the account then held by the plaintiff
80 against the defendants, and if so to what extent?

12. Who sold said goods, or any part thereof, to the defendants?

13. Before and on the day of the aforesaid interview between you, the defendant Waggaman, and the defendants' counsel, did you personally see and talk with the defendant Coldenstroth in his place of business about the defendants' turning over said goods to you for the plaintiff or the Geo. E. Keith Co.?

14. If you presented to the defendants a statement of account as mentioned in direct-interrogatory No. 6, where is such statement? If you have it, please produce and attach it to your answer to this cross-interrogatory.

15. Has the Geo. E. Keith Co. paid the aforesaid Lewis A. Crossett the sum of $331.50, due to him, during the month aforesaid, from the defendants, in whole or in part, and if only in part, what part?

16. Has the Geo. E. Keith Co. in any other way than by payment or payments of money satisfied or discharged, in whole or in part, the said account of $331.50 of the said Lewis A. Crossett against the defendants which they owed him during the month aforesaid, and if in part, what part?

17. Was the said Crossett informed of the said agreement, and did he consent thereto or ratify the same?

THOMAS M. FIELDS,
Attorney for Defendants.

81 Answer to first cross interrogatory:

I was in the employ of the George E. Keith Co. during the month of April 1900, in the capacity of assistant credit clerk.

Answer to second cross-interrogatory:

I received from the defendants during the month of April, 1900, 270 pairs of George E. Keith Co.'s shoes. I did not receive any goods or merchandise for the plaintiff, Lewis A. Crossett.

Answer to third cross interrogatory:

As stated in reply to second cross interrogatory, I received 270 pairs of shoes manufactur*ing* by the George E. Keith Co. cost price $685.90, and selling value, at retail, according to letter head of defendants, $3.50 per pair.

Answer to fourth cross-interrogatory:

All of those I received, 270 pairs.

Answer to fifth cross-interrogatory:

I did not receive any other shoes from defendants other than the 270 pairs above mentioned.

Answer to sixth cross interrogatory:

No other maker's goods were turned over to me by defendants.

Answer to seventh cross-interrogatory:

I did not know Lewis A. Crossett personally at the time the goods were turned over to me by B. A. Waggaman & Co. Mr. Waggaman informed me that he was indebted to Lewis A. Crossett but did not state the exact amount.

Answer to eighth cross-interrogatory:

I did call with Bernard A. Waggaman during the month aforesaid upon defendants' counsel at his residence, and consulted
82 with said counsel and Waggaman in regard to defendants' turning over to me for the George E. Keith Co. such part of defendants' stock as was manufactured by the George E. Keith Co. then in the defendants' store, but no mention at said conference was made with reference to turning over to me goods manufactured by Lewis A. Crossett or any other manufacturer other than those manufactured by the George E. Keith Co.

Answer to ninth cross-interrogatory:

A final agreement was reached between myself and the defendants and their counsel at said interview, the agreement being that the George E. Keith Co. goods should be turned over to me to be shipped by me back to Campello, with the understanding that after the goods were disposed of the net proceeds of the sale thereof would be credited to B. A. Waggaman & Co.'s account with the George E. Keith Co.

Answer to tenth cross-interrogatory:

The agreement was carried out by the defendants and the goods delivered by them to me on the day the agreement was made.

Answer to eleventh cross-interrogatory:

The plaintiff, Lewis A. Crossett, received no goods whatever from B. A. Waggaman & Co. and were in no manner mentioned or connected with the agreement which was reached between myself, the defendants and their counsel at the interview referred to in answer to eighth cross-interrogatory.

Answer to twelfth cross-interrogatory:

The said goods were originally sold to B. A. Waggaman &
83 Co. in part by A. H. Jenkins, travelling salesman for George E. Keith Co. and the balance were sold to B. A. Waggaman & Co. by the said George E. Keith Co. upon request received from defendants through the United States mail.

Answer to thirteenth cross-interrogatory:

On the day or the day before the said interview, I did see and talk with defendant Coldenstroth in his place of business about defendants turning over to me the George E. Keith Co.'s goods.

Answer to fourteenth cross-interrogatory:

As stated in my answer to direct interrogatory number six I did not present to defendants a statement of plaintiffs' account.

Answer to fifteenth cross-interrogatory:

The George E. Keith Co. has paid to Lewis A. Crossett the sum of $58.16 only, which amount represented the net proceeds of the amount realized from the sale to Edmonston & Co. to apply on Mr. Crossett's account.

Answer to sixteenth cross-interrogatory:

The George E. Keith Co. has not in any other way than by payment of the amount heretofore mentioned, viz. $58.16, done anything whatever to satisfy or discharge the amount of B. A. Waggaman & Co.'s indebtedness to the said Lewis A. Crossett.

Answer to seventeenth cross-interrogatory:

When I returned from Washington I advised Mr. Crossett's representative of the arrangement which I had made with B. A. Waggaman & Co. and their counsel in relation to the disposition of the George E. Keith Co.'s goods, and I also told him about the arrangement which could be made in relation to disposing of Mr. Crossett's goods
84 to Edmonston & Co. on the basis of 70 % of their invoice value, and Mr. Crossett's representative consented to have Mr. Crossett's goods sold to Edmonston & Co. on that basis, with the distinct understanding that the net proceeds only should be credited on B. A. Waggaman & Co.'s indebtedness to Mr. Crossett.

GEO. H. LEACH.

85 *Decree, Appeal, &c.*

Supreme Court of the District of Columbia.

FRIDAY, *February* 6, 1903.

Court meets pursuant to adjournment, Mr. Associate Justice A. B. Hagner, presiding.

* * * * * * *

BERNARD A. WAGGAMAN ET AL. *vs.* GEORGE E. KEITH COMPANY ET AL. } No. 22733. Equity Docket 51.

This cause coming on to be heard on the bill, answers, affidavits, stipulation and testimony filed herein, and having been duly con-

sidered, it is by the court, this 6th day of February, A. D. 1903, adjudged, ordered and decreed that the bill be and the same hereby is dismissed, without prejudice to the right of complainants to present the contentions relied upon by them in the present cause in the actions at law now pending, or brought, or hereafter to be brought, by the defendants against them; and it is further decreed that the complainants pay the costs of this suit.

A. B. HAGNER,
Asso. Justice.

From the above decree the complainants appeal in open court, and the penalty of the bond, to act as a supersedeas, is fixed at $500.00.

A. B. HAGNER.

Memorandum.

March 2, 1903.—Appeal bond filed.

86 *Præcipe for Transcript.*

Filed March 30, 1903.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN ET AL.
vs.
GEORGE E. KEITH CO. ET AL. } Equity. No. 22733.

The clerk will please prepare the transcript of record on appeal in this suit, and include therein the following:

1. Original bill.
2. Affidavit of Bernard A. Waggaman.
3. Affidavit of George W. Coldenstroth.
4. Affidavit of Thomas M. Fields.
5. Restraining order.
6. Answer of George E. Keith Co.
7. Answer of Lewis A. Crossett.
8. Affidavit of George H. Leach.
9. Affidavit of Willard H. Thayer.
10. Motion to dissolve injunction.
11. Order overruling motion to dissolve injunction.
12. Replication.
13. Stipulation.
14. Affidavit of defense.
15. Affidavit of defense.
16. Deposition of George H. Leach.
17. Depositions of Willard H. Thayer, George A. Crossett, and George H. Leach.

18. Final decree.
19. Memorandum of approval and filing of appeal bond.
20. This præcipe.

THOMAS M. FIELDS,
Solicitor for Complainants.

87 *Additional Papers Ordered by Counsel for Appellees.*

Filed April 6, 1903.

In the Supreme Court of the District of Columbia.

BERNARD A. WAGGAMAN ET AL.
vs.
GEORGE E. KEITH CO. ET AL. } Equity. 22733.

The clerk will please include in the transcript of record on appeal,—

13*a*. Affidavit of complaint Lewis A. Crossett *vs.* B. A. Waggaman *et al.*

13*b*. Affidavit of complaint George E. Keith Co. *vs.* B. A. Waggaman *et al.*

RALSTON AND SIDDONS,
EUGENE A. JONES,
Attorneys for Defendants.

88 *Affidavit.*

In Justice's Court of the District of Columbia.

LEWIS A. CROSSETT
vs.
BERNARD A. WAGGAMAN and GEORGE W. COLDENSTROTH, Laterly Trading as B. A. Waggaman and Co.

STATE OF MASSACHUSETTS, *City of Boston,* } *ss:*

Lewis A. Crossett, being first duly sworn, on oath says that he is the plaintiff in the above entitled suit; that he has personal knowledge of the facts herein stated; that Bernard A. Waggaman and George W. Coldenstroth, lately trading as B. A. Waggaman and Co. are the defendants in said suit and are indebted to said plaintiff—in the sum of $248.34 (two hundred forty-eight and 34/100 dollars), for goods sold and delivered by the plaintiff to the defendants at the latter's request, the said goods being of the kind and quality ordered by the defendants and being the same described in an itemized statement of account annexed hereto and marked "Exhibit A," to which reference is hereby made; that said goods are of

the value shown by said statement, and the said sum of $248.34, is due and owing by the defendants to the plaintiff by reason of the premises, and the defendants have no just defense thereto.

LEWIS A. CROSSETT.

89 Subscribed and sworn to before me this 10th day of November, 1900.

CHARLES W. LAVERS,
[SEAL.] *Notary Public.*

If plaintiff is a corporation, fill in "the secretary (or treasurer) of the (give name of corporation,) a corporation organized under the laws of the State of ——, which corporation is" ——

If plaintiff is a co-partnership, fill in "a member of the firm of (give name of firm,) a co-partnership composed of (give names of partners,) which co-partnership is" ——

This affidavit must be sworn to before a notary public having a seal, and the official seal should be attached hereto.

90 NORTH ARLINGTON, MASS., *Nov.* 9, 1900.

[On the margin:] Pay no agents.

B. A. Waggaman & Co., Washington, D. C., to Lewis A. Crossett, Dr.

Boston salesroom, No. 59 Lincoln St.

Terms 30 days, less 5 per cent.
1899.

Nov. 25. To mdse..... $331 50

CREDIT.

May 31. By amount realized on goods taken and sold to apply on account..... 83 16

$248.34

91 Lewis A. Crossett, manufacturer of gentlemen's footwear.

NORTH ARLINGTON, MASS., *Nov.* 25, 1899.

Sold to B. A. Waggaman & Co., F street, Washington, D. C.

13191–300	16	pr.	pat.	of	welt	bals.	5	1/2/10	adm.	A	2.60...	41 60
13192–300	17	"	"	"	"	"	5/10		"	E	" ...	44 20
13193–300	17	"	"	"	"	"	"		"	C	" ...	44 20
13194–300	15	"	"	"	"	"	"		"	D	" ...	39 00
13195–310	16	"	box	"	"	blchr.	5	1/2 10	trav.	A	2.50...	40 00
13196–310	17	"	"	"	"	"	5/10		"	B	" ...	42 50
13197–310	17	"	"	"	"	"	"		"	C	" ...	42 50
13198–310	15	"	"	"	"	"	"		"	D	" ...	37 50

$331 50

Copy.

92 In Justice's Court of the District of Columbia.

GEORGE E. KEITH COMPANY, a Corporation Organized and Existing under the Laws of Massachusetts,
vs.
BERNARD A. WAGGAMAN and GEORGE W. COLDENSTROTH, Lately Trading as B. A. Waggaman & Co.

STATE OF MASSACHUSETTS, *City of Boston,* } *ss:*

D. Cary Keith, being first duly sworn, on oath says that he is treasurer of the Geo. E. Keith Co., a corporation organized and existing under and by virtue of the laws of Mass. which corporation is the plaintiff in the above entitled suit; that he has personal knowledge of the facts herein stated; that Bernard A. Waggaman and George W. Coldenstroth lately trading as B. A. Waggaman and Co. are the defendants in said suit, and are indebted to said plaintiff in the sum of $36.67, for goods sold and delivered by the plaintiff to the defendants at the latter's request, the said goods being of the kind and quality ordered by the defendants and being the same described in an itemized statement of account annexed hereto and marked "Exhibit A," to which reference is hereby made; that said goods are of the value shown by said statement, and the said sum of $36.67 is due and owing by the defendants to the plaintiff by reason of the premises, and the defendants have no just de-
93 fense thereto.

D. CARY KEITH.

Subscribed and sworn to before me this 8th day of November 1900.

CHARLES C. KING,
[SEAL.] *Notary Public.*

If plaintiff is a corporation, fill in "the secretary (or treasurer) of the (give name of corporation,) a corporation organized under the laws of the State of ——, which corporation is" ——

If plaintiff is a co-partnership, fill in "a member of the firm of (give name of firm,) a co-partnership composed of (give names of partners,) which co-partnership is" ——

This affidavit must be sworn to before a notary public having a seal, and the official seal should be attached hereto.

94 CAMPELLO, MASS., *April* 19, 1900.

M-. Waggaman & Co., Washington, D. C., to Geo. E. Keith Company, Dr.

Terms: —.

Nov. 17.	To mdse.....	386.05	
Dec. 19.	.....	174.20	
Jan. 1.	.....	3.20	
M'ch 17.	.....	9.45	
			572.90

CREDITS.

Apr. 23.	Allowance for express on a former slipt....	31.10	
Apr. 21.	Sale mdse. (G. E. K. goods).....	480.13	
21.	Our share sale of other make's of goods than our own.....	25.	
			536.23
			36.67

95 *Order Extending Time to File Record.*

Filed April 11, 1903.

In the Supreme Court of the District of Columbia.

B. A. WAGGAMAN & Co.
vs.
GEORGE E. KEITH CO. ET AL. } Equity. No. 22733.

Upon motion of the complainants, by their solicitor, and for special cause shown to the court, it is, this eleventh day of April, 1903, ordered that the time to file the transcript of record on the appeal in this cause be and it is hereby extended to and including May 15, 1903.

By the court:

ASHLEY M. GOULD, *Justice.*

96 *Order Extending Time to File Record.*

In the Supreme Court of the District of Columbia.

BERNARD WAGGAMAN ET AL.
vs.
GEORGE E. KEITH CO. ET AL. } Equity. No. 22733.

For special and sufficient cause unto the court duly shown by counsel for the complainants herein, it is this 15th day of May, 1903, ordered that the time to file the transcript of record on the appeal

in this suit be and it is hereby extended to and including June 1, 1903.

By the court:

ASHLEY M. GOULD, *Justice.*

97 *Further Extension of Time to File Record.*

Supreme Court of the District of Columbia.

MONDAY, *June* 1″, 1903.

The court meets pursuant to adjournment, Mr. Justice Thomas H. Anderson, presiding as per assignment this day by court in general term.

B. A. WAGGAMAN & Co.
vs.
GEO. E. KEITH CO. ET AL. } No. 22733, Equity Docket No. 51.

For good and sufficient cause unto the court by the complainants duly shown and upon motion of the complainants, by their solicitor, it is this 1st. day of June, 1903, ordered that the time to file the transcript of record on the appeal herein in the Court of Appeals be, and it hereby is, extended to and including July 1″, 1903.

THOS. H. ANDERSON, *Justice.*

98 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 97, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copies of which are made part of this record, in cause No. 22,733, wherein Bernard A. Waggaman, *et al.*, are complainants, and The George E. Keith Company, a corporation, *et al.*, are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 29″ day of May, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1346. Bernard A. Waggaman *et al.*, appellants, *vs.* George E. Keith Company *et al.* Court of Appeals, District of Columbia. Filed Jul- 1, 1903. Robert Willett, clerk.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1903.

No. 1346.

BERNARD A. WAGGAMAN AND GEORGE W. COLDENSTROTH, LATE COPARTNERS TRADING UNDER THE FIRM NAME OF B. A. WAGGAMAN & COMPANY, APPELLANTS,

v.

GEORGE E. KEITH COMPANY, A CORPORATION, AND LEWIS A. CROSSETT, APPELLEES.

BRIEF FOR APPELLANTS.

THOMAS M. FIELDS,
Solicitor for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9904

Court of Appeals, District of Columbia.

OCTOBER TERM, 1903.

No. 1346.

B. A. WAGGAMAN & CO., APPELLANTS,

v.

GEO. E. KEITH CO. AND LEWIS A. CROSSETT, APPELLEES.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

This is an appeal from a decree of the supreme court of the District of Columbia dismissing a bill to enjoin two certain actions at law before a justice of the peace, and for other relief.

The appellants are residents of this District. *Both of the appellees are non-residents.* The Keith Co. is a Massachusetts corporation, having its habitat and place of business at Campello, Mass., while Crossett resides in North Arlington, Mass.

On April 20, 1900, and for some time prior thereto, the appellants were copartners engaged in the retail shoe business at No. 1311 F street N. W., under the firm name of B. A. Waggaman & Co. They then owed Keith Co. $541.80

and Crossett $331.50 for shoes made by these creditors; and they then had in their store a stock of new shoes, chiefly of the makes of Keith and Crossett—the others being of the make of one Heywood—of the value, *at cost*, of $810.60, and of a much greater value at retail. They had determined to dissolve their partnership and to liquidate all their firm affairs. To this end they had already paid in full all their debts, except only those due Keith and Crossett, and their landlord, who claimed a lien on their stock for his rent. By sale of the stock at retail, by private sale, or at auction, in single pairs or small lots, they could readily have realized sufficient, or more than sufficient, money to have discharged these three claims in full.

On Friday, April 20, 1900, one George H. Leach, agent of the Keith Co., saw the appellants together about the sum due. The appellant Coldenstroth suggested that Leach and Waggaman call on Fields, the firm's attorney, with a view to reaching a satisfactory basis of settlement. Acting upon this suggestion, Leach and Waggaman saw Fields at his residence, where they talked over the matter and reached an agreement. *This agreement was that the Keith Co. would take the entire stock of the firm in full settlement of its own claim, and would personally assume and pay in full Crossett's claim against the firm.* Later in the same day the whole stock was turned over to Leach under this agreement, and from that time the appellants' ownership and control thereof ceased. Then they settled their landlord's demand and completed their dissolution and liquidation and retired from the shoe business.

Thus matters rested for about *six months*, when, to their great surprise, appellees' present solicitors, on October 5, 1900, wrote the appellants that they held for collection against them a claim of Keith for $36.67 and one of Crossett for $31.50, represented by appellants' notes. These claims were in fact on open accounts, and Crossett's was for $331.50, as it subsequently developed. The appellants, of

course, refused to pay these claims, at the same time advising the counsel of their reason (R., 10–11). The counsel communicated this reason to Keith and Crossett, both of whom repudiated the agreement under which the stock was delivered to Leach on April 20, 1900 (R., 11).

On November 19, 1900, both Keith and Crossett, through the same attorneys, sued the appellants before a justice of the peace. Keith sued for $36.67, while Crossett sued for $248.84. This was the balance of $331.50 then claimed by him, as it appeared that *Keith Co. had paid him only* $83.16 *on account of his claim against the appellants* (R., 51), and had left open a balance of $36.67 on its own books against them (R., 53).

The appellants duly pleaded to the actions before the justice of the peace, and various other proceedings were had there; but before either of the cases was ever tried the present suit in equity was filed to enjoin the further prosecution of those actions, and to settle by decree in this one suit all matters and things in dispute between the parties.

The court below granted a preliminary injunction (R. 12), which was afterwards continued until the final hearing (R. 23–24). The record for the final hearing was made up under a stipulation of counsel (R., 24–25). The court below dismissed the bill with costs (R., 48–49), and the complainants appealed. In this way are presented the questions raised by this appeal. These questions are two-fold, one being of law and the other of fact. The former is whether a court of equity has jurisdiction of the case made by the bill, while the latter is whether the agreement alleged by the appellants was in fact made.

The appellants' case is stated more fully and accurately in their bill and the affidavits filed with it, to which reference is respectfully made.

OPINION OF COURT.

The court below delivered a short oral opinion, holding only that the bill should be dismissed without prejudice, because it presented no case within the jurisdiction of a court of equity. The merits of the case were neither considered nor decided by the learned justice.

ASSIGNMENT OF ERRORS.

1. The court erred in dismissing the bill.

2. The court erred in dismissing the bill for want of jurisdiction.

3. The court erred in not considering and deciding the cause upon its merits.

4. The court erred in not granting the relief prayed for in the bill.

JURISDICTION.

The jurisdiction of a court of equity over the case made by the bill can be sustained upon several well-settled grounds:

1. *Set-off*, the appellees being *non-residents*.

2. *Fraud*, under the agreement alleged by appellants.

3. *Injunction*, as in justice and good conscience the appellees' actions at law ought not to be enforced.

4. *Multiplicity of suits*, to prevent which this bill will lie.

5. *Accounting*, as to the items of appellees' accounts.

6. *Assumption of debt*, to enforce which appellants must properly sue in equity to require the Keith Co. to pay the balance of their debt to Crossett.

7. *Mistake of fact*, at the least.

It is very clear, from the record, that appellants cannot successfully plead against Crossett, in his action at law, their agreement with the Keith Co., as Crossett was evidently not such a party to that agreement as to bind him at law. The result would be that Crossett would recover, *they would have to pay him*, and then sue the Keith Co., *a non-resident*, for what they had paid Crossett. Undoubtedly Crossett has received the benefit of the agreement to the extent of $83.16, which he retains, but this could not be well pleaded against him at law. By reason of the agreement, and what has been done under it, the appellants have a meritorious, equitable defense to his action at law, which they cannot set up. This is sufficient of itself to give equity jurisdiction.

"Again, it is well-established that equity will entertain jurisdiction and afford relief against the collection of a judgment where in justice and good conscience it ought not to be enforced, as where there is a meritorious, equitable defense thereto, which could not have been set up at law, or which the party was, without fault or negligence, prevented from interposing."

North Chicago Co. *v.* St. Louis Co., 152 U. S., 596.

Under the agreement and Crossett's subsequent connection with it appellants have an equitable set-off against him, and equally so against Keith Co. The jurisdiction of equity in matters of set-off has been too fully declared in the case just cited, and by this court in Fedarwisch *v.* Alsop, — App. D. C., —, to be questioned now. The mere *non-residence* of the appellees of itself is sufficient to confer jurisdiction.

"In addition to insolvency, it is held by many well-considered decisions * * * that the *non-residence* of the

party against whom the set-off is asserted is good ground for equitable relief."

North Chicago Co. *v.* St. Louis Co., 152 U. S., 596.

"The adjustment of demands by counter-claims or set-off rather than by independent suit is favored and encouraged by the law to avoid circuity of action."

Id., ibid., citing—

Florida R. Co. *v.* Smith, 88 U. S., 21 Wall., 255 (22–531).

In Samaha *v.* Samaha, 29 W. L. R., 176, this court held to a liberal application of the doctrine of set-off, and said that "it proceeds upon equitable principles to mitigate the rigor of the rule of law by avoiding multiplicity of suits and the duplication of costs."

In the appellants' brief in the case of Fedarwisch *v.* Alsop, *supra* (No. 1065), will be found a full collection of the authorities bearing upon the jurisdiction of equity in matters of set-off and counter-claim. As I wrote that brief, I shall respectfully refer the court to it for a further discussion of the subject. That case was quite similar to this upon this point. The same justice who dismissed this bill for want of jurisdiction dismissed that *for the very same reason.* This court had no doubts whatever in reversing his decree in that case.

Surely, upon the case made by the bill, the appellants have no complete, adequate remedy at law, nor as adequate remedy as they have in equity. Equity will take jurisdiction where the remedy is more adequate than at law (Wylie *v.* Coxe, 15 How., 415). Equity will relieve in cases of mistake of fact, as a general rule (Cathcart *v.* Robinson, 5 Pet., 264). *The prevention of a multiplicity of suits is a distinct ground of original jurisdiction in equity* (Oelrichs *v.* Spain, 15 Wall., 211). *The remedy at law, in order to prevent a resort to equity, must be as efficient both in respect to the relief* AND THE MODE OF OBTAINING IT *as in equity* (Kilbourn *v.* Sunderland, 130 U. S., 505).

Of course, if equity takes jurisdiction of this case it will, by its decree herein, completely adjust and settle all matters and things in dispute between the parties (1 Pom. Eq. Jur., sec. 242, citing numerous Federal cases). Many cases to this point will also be found collected and quoted from in my brief in Fedarwisch *v.* Alsop, No. 1065, pp. 13–15, to which I respectfully refer.

Finally, it may be added that "equitable jurisdiction, having once rightfully attached, cannot be defeated by matter subsequently arising, which does not go to the *merits* of the complainant's case. The state of facts existing when the bill was filed must be looked to in determining the question of equitable jurisdiction, which in this case is rested on the ground of insolvency and *non-residence.*"

North Chicago Co. *v.* St. Louis Co., *supra.*

It seems to me that the learned justice who dismissed this bill for want of jurisdiction was as much in error in this case as he was in dismissing, for the same reason, the bill in Fedarwisch *v.* Alsop, in which his decree was reversed absolutely by this court. I believe that the bill here presents a good case for equity jurisdiction, and that it should be considered and decided upon its merits only.

THE MERITS.

It is expressly conceded that the appellees are *non-residents* (R., 13, par. 1; 17, par. 1, etc.). It is also conceded that on April 20, 1900, the appellants owed Keith Co. $541.80 and Crossett $331.50 (R., 13, par. 1; 17, par. 1, etc.). Leach says (R., 34) that the *Keith shoes alone*—270 pairs—which he received from appellants in April, 1900, *cost* $685.90, and that *their* retail price was $945. Appellants say (R., 2, par. 4) that all of their then stock—Keith, Crossett, and Heywood shoes—cost $810.60, and that their retail price was $945. Keith admits (R., 13, par. 4) that it paid Crossett

$83.16, but immediately thereafter asserts that it paid him only $58.16. Crossett (R., 17, par. 4) says that Keith paid him only $58.16, and not $83.16. He admits that $331.50 was the whole sum due him on April 20, 1900. In his itemized statement he credited appellants with $83.16, as received from Keith, leaving a balance due him of $248.34, which sum he swore (R., 50–51) was due him from the appellants in his action before the justice of the peace. In this suit he and his witnesses sometimes state one sum and sometimes another as paid and due him. It is evident that they have frequently misstated the balance due him and the amount received from Keith. The flat contradictions between his affidavit and itemized statement (R., 50–51) and his answer (R., 17, par. 4), and Leach's affidavit (R., 20), and Thayer's affidavit (R., 22), and Thayer's deposition (R., 38, 39), and Thayer's deposition (R., 41, *ad finem*), and his (Crossett's) deposition (R., 43), and Leach's deposition (R., 48), are quite embarrassing, to say the least. How is this discrepancy in figures to be accounted for? Certainly, nothing in the record accounts for it.

The agreement, as alleged in paragraph 5 of the bill, is clearly stated and is strongly supported by the oaths of the appellants and their attorney, Fields (R., 5, 6–7, 8–9, 9–11). They and only one other person, George H. Leach, have personal knowledge of the terms of this agreement. Upon the oaths of these four persons rests the question whether the agreement as alleged in the bill was made or not. Three of them swear positively that it was, while the fourth admits all the surrounding details, and that an agreement was made, but he asserts that its terms were different from those alleged in the bill. Upon this question of fact the answers of Keith and Crossett and all of the appellees' affidavits and depositions must be laid aside, *except only the affidavit and depositions of Leach*, as he is the only person competent to speak for them upon this subject.

There will be found no contradictions between the bill and

the affidavits filed by the appellants. This cannot be said of the appellees' case. Leach not only flatly contradicts the appellants' proof of the terms of the agreement, but he contradicts himself and other witnesses of the appellees; and, further, Leach recites a condition of facts which appears incredible and without reason. He repeatedly swears that he was to receive and did in fact receive, *only the Keith Co. shoes* (R., 19–20, 31, 35, 47, etc.); yet he admits (R., 20) that *all* of the stock was turned over to Edmonston, and that *the money for all of it was received by Keith Co. from Edmonston.* Why did Keith Co. get *all* the money if it did not sell Edmonston *all* the stock? Why did Keith Co. sell the Heywood goods and credit its account against the appellants with $25 (R., 53, 20) as the proceeds of the sale of these goods? Why did Keith Co. sell the Crossett goods and get the money for them and pay it over to Crossett? Why all these things *if Leach never got any but the Keith Co. shoes?* Leach got the stock on Friday, April 20, 1900, and on Saturday, April 21, 1900, he turned over *all of it* to Edmonston. How did he do this conceded thing if he got only the Keith goods? Leach claims that he saw Fields *after* the sale to Edmonston; but as to this he gives no details. Fields says that he has never seen Leach since the interview in which the agreement was reached (R., 10). Just why the appellants should need Crossett's consent to sell their goods of his make, as claimed by Leach and Thayer, it is difficult to see. They could sell the Keith, Crossett, and Heywood shoes as they pleased, regardless of the fact whether they were paid for or not. If *they* wanted to sell to Edmonston, why should Leach do so, and *why should the Keith Co. get all the money?* Thayer (R., 38–39) even goes so far as to state that Leach asked Crossett's permission (after Leach had sold all the shoes) to sell the shoes of his make *and the Heywood shoes* to Edmonston! Does this look as if the appellants were running this affair? There were only 18 pairs of Cros-

sett's make and 29 of Heywood's (R., 38–39), the latter having been fully paid for.

Again, what reason is there given by Leach or his associates why the appellants should voluntarily permit him to leave them about $400 in debt to Keith and Crossett, when the appellants themselves were fully able and had ample opportunities to sell the stock at retail or auction so as to realize from it sufficient, or more than sufficient, to pay Keith and Crossett and the landlord *in full?* It is conceded that appellants owed Keith $541.80. Leach says the Keith goods alone *cost* appellants $685.90, and that their retail price was $945; yet for them and the Heywood goods he credited appellants with only $505.13—$480.13 for the Keith shoes and $25 for Heywood's. One could continue *ad libitum* to point out the glaring inconsistencies in Leach's assertions as to the agreement, but surely enough has been said and will be seen upon casually reading the record to show that the agreement was as claimed by the appellants, and not as asserted by Leach. I prefer that this question of fact should be determined more upon reason and surrounding circumstances than upon mere numbers of witnesses *pro* or *con.*

Again, Leach asserts that he had no authority from Crossett to make the agreement alleged in the bill. Crossett makes the same assertion. Leach makes no such claim as to the Keith Co., nor does the Keith Co. make any such claim. So far, therefore, as the Keith Co. is concerned, it must be taken as a fact that he had such authority. *Keith Co. received all the money for all the shoes* from Edmonston, and Crossett received $83.16 of this money from Keith Co. *Before they sued the appellants they were specifically advised of the agreement asserted by appellants* (R., 10–11), yet both of them retained the money while repudiating the agreement under which they got it. The bill (R., 3, par. 10) asserts Keith Co.'s repudiation of the agreement and its obligations and its retaining of the money received under it. Keith Co. answers this by stating that " this defendant *admits* the alle-

gations of paragraphs *ten*," etc. (R., 13). Just how it could repudiate an agreement which it says it never made it is difficult to see. The bill (R., 4, par. 11) also asserts that Crossett afterwards fully learned of the terms and conditions of the agreement, but repudiated it and kept the money which he admittedly received under it. Crossett answers this by stating (R., 17, par. 7) that "I *admit* the allegations of paragraphs ten, *eleven*," etc. Nowhere in the record do the appellees present any affidavit from Betz, Edmonston's buyer, to whom Leach sold the goods. Why this ominous omission as to one favorable to them if their contention be true? They could easily have procured and filed Betz's affidavit if they wanted it.

In his affidavit (R., 19) Leach says it was *agreed* by him to take such part of the stock as was supplied by Keith Co. "*and ship said George E. Keith Company's goods to Campello to be sold at the best possible price*," etc. But Thayer in his affidavit (R., 22) says that Leach told him that he, Leach, "had *agreed* to take George E. Keith Company's goods that B. A. Waggaman & Co. had in stock, *and to sell them to Edmonston & Co., of Washington, D. C., at 70 % of the invoice price*," etc.

If we follow Leach in this matter, we shall find a most elastic agreement, to say the least!

In its answer (R., 14, *ad finem*) Keith Co. says that *after* the sale and delivery of all of the goods to Edmonston & Co., Waggaman individually, "and on a *subsequent* occasion said Waggaman and Mr. Thomas M. Fields, attorney for complainants, together acknowledged *the balance* claimed, and promised that the same should be settled. It was suggested that a note be given in settlement of *the balance*, but Mr. Fields explained that a settlement pending with *the landlord* in regard to the lease might require ready cash, and that they did not want to feel that they must pay a certain sum at a certain time on that account." (*The balance now claimed is only $36.67!* This allegation of the answer is,

of course, predicated exclusively of Leach's statements to the Keith Co., and must be proved, if at all, solely by Leach himself. It will be recalled that the agreement with Leach was reached at Fields' residence, Waggaman, Leach, and Fields being present. (See affidavits of Waggaman, Coldenstroth, and Fields, R., 6–7, 8–9, 9–11.) Leach also says the same (R., 34–35, 47, Leach's depositions). Nowhere does Leach mention *but one conference* with Fields at his residence or elsewhere. In his depositions (R., 34–35, 47) he says that this conference related to turning over to him the goods—*not the balance claimed or anything else.* Fields says that he never saw Leach after that conference. "Mr. Leach and Mr. Waggaman then left (his residence), *and I have never since seen the former*" (R., 10). Notwithstanding Leach's admissions and testimony and the positive proof of the appellants that but one conference ever took place at Fields' residence or elsewhere at which Leach, Waggaman, and Fields were present, Leach says in his affidavit (R., 20–21) that "I distinctly recall a conversation had at the residence of Mr. Fields, at which time Mr. Waggaman was present, in which I suggested that I be given a note in favor of George E. Keith Co. to settle *the balance* of the Keith account, which after (having been) credited with $505,13, net proceeds of the sales to Edmonston, was $36.67; but Mr. Fields said that there was some complication over the settlement with the landlord in regard to the lease of the premises which *had been* occupied by these complainants, and that this settlement might demand ready cash, and that they did not want to feel that they must pay a certain sum ($36.67!) at any certain time on that account."

It is absolutely certain from Leach's depositions alone—and equally certain from the affidavits of the appellants and their attorney—that but one conference ever took place between Leach and Waggaman and Fields; that this conference took place on Friday, April 20,

1900, at Fields' residence; that it related exclusively to turning over the stock to Leach, and that it resulted in an agreement between the parties. At that time neither the value nor quantity of the stock was known exactly. The stock was in appellants' exclusive possession in their store *which they were then occupying.* It had not been turned over to Leach. No sales to Edmonston had been made. No proceeds of sales had been received. No correct figures as to ultimate results could by any possibility have been stated at that conference. Is it possible to believe the statement of Leach last quoted? Is it reasonable, in view of what has been shown, to believe his version of the agreement? He is too nimble and vacillating to be relied upon as a witness in this case. The real agreement was that alleged in the bill, and not *one of those* asserted by Leach. Manifestly, his story of the agreement and balance is pure fabrication. This record breathes forth a strong impression that the appellees are consciously endeavoring to enforce a wrong by such subtle and evasive use of words as will give to falsehood the appearance of truth.

The promise of Keith Co. to assume and pay appellants' debt to Crossett was, of course, not within the statute of frauds. It was a mere promise to the vendors to pay their debt owed a third person, and was not a promise to pay the debt of a third person. It was only a promise to pay a part of the purchase price of the goods to one other than the vendors, and hence was not within the statute of frauds.

Ware *v.* Allen, 55 Miss., 547.

The new promise to pay, made by the appellant Waggaman, after the debt had been discharged by the voluntary act of the parties, was invalid without a new consideration, even though the debt or a portion of it were unpaid. Clearly, Waggaman's promise could not bind Coldenstroth. This point is fully discussed, with citations of the cases, in 53

L. R. A., 363, note. To the same point is Koons *v.* Vanconsant, Mich., 68 N. W. Rep., 630.

Again, the shoes were taken and accepted in full satisfaction of the Keith and Crossett claims. Their value was therefore immaterial, and there would be no liability if their value were less than the debts. The rule that a liability cannot be discharged by payment of a less sum *applies only to payment in money.*

1 Cyc., 335, 336, and cases cited.

See Jackson *v.* P. R. R. Co., 55 L. R. A., 87 (N. J. Err. & App.).

Retaining the benefits of the agreement, as they do, after full knowledge of it, and refusing to return them, can the appellees justly repudiate this agreement, and prosecute actions for the recovery of the alleged balances due them? It is submitted that they cannot.

"It is true that the fraud was perpetrated by an agent, and it is argued that he did not represent the bank for an illegal act. But unless this means that there was no sale, as the answer and a part of the argument seem to suggest—in which case, of course, Petrie must have his money back—the answer is that if the bank relies upon the sale it must take it with the burden of the fraud. It must adopt the whole transaction or no part of it. It cannot affirm what is for its advantage and repudiate the rest."

National Bank *v.* Petrie, — U. S., —. (Decided March 9, 1903.)

McLaughlin *v.* Park City Bank, 54 L. R. A., 343, and note.

A creditor, receiving the benefit of a transfer of the accounts of his debtor under a contract releasing the guarantors of the debtor, cannot deny such consideration in an action against the guarantors (Martin *vs.* Rotan Grocery Co., Texas, 66 S. W. Rep., 212). It is essential to estoppel by conduct that the party claiming to be influenced should not

only be destitute of information as to the matter in controversy, but also without means of acquiring such information (Atkinson *vs.* Plum, W. Va., 40 S. E. Rep., 587).

Does Crossett or Keith Co. appear to have been de titute of information as to the agreement and without means of acquiring it? Where a person dealing with an agent according to business usages is justified in presuming that the agent has authority to do a particular act, the principal is estopped to deny that the agent has such authority (Lebanon Savings Bank *v.* Henry, Neb., 89 N. W. Rep., 169). Ostensible authority to act as agent may be inferred if the party to be charged as principal affirmatively, intentionally, or by lack of ordinary care allow third persons to act on such apparent agency (Faulkner *v.* Simms, Neb., 89 N. W. Rep., 171). If the payee of a note taken for him from the maker by an *agent upon a condition not disclosed to the payee or outside of the scope of the agency keeps it, the payee cannot repudiate the condition and insist upon holding and enforcing the note. He is bound, if he does not intend to abide by such condition, to return or offer to return the note within a reasonable time* AFTER DISCOVERING THE FACTS.

Andrews *v.* Robertson, 87 N. W. Rep., 190, Wis; 29 Wash. Law Rep., 701, 702.

If the agreement be as alleged in the bill, are not both Keith Co. and Crossett bound by their conduct in a court of equity at least?

A principal cannot repudiate his agent's agreement and retain the benefits of it (Plano Mfg. Co. *v.* Nordstrom, 88 N. W. Rep., 164). Where a party to a contract acts upon it, and obtains all the benefits to be derived thereunder, he is estopped from objecting to the same on the ground that he did not sign it (Lane *v.* P. & I. N. R. R. Co., 67 Pac. Rep., 656, Idaho). Payment to an agent not authorized to receive it becomes effectual as a payment to the principal on appropriation by him

with knowledge of the facts of the money paid to the agent (Payne *v.* Hackney, 87 N. W. Rep., 608, Minn.).

The stipulation (R., 24–25) saves to the parties all proper objections to the relevancy, competency, and admissibility of the matters and things stated in the various sworn papers used as evidence in this case. Many such objections to the appellees' evidence will appear upon a casual reading of their defense. I shall not prolong this brief by pointing them out in detail, but this does not mean that the appellants waive any such objections.

It is respectfully submitted that the decree appealed from should be reversed and the cause remanded, with directions to enter a decree in favor of the complainants, according to the prayers of their bill.

THOMAS M. FIELDS,
Solicitor for Appellants.

WASHINGTON, *December*, 1903.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1903.

No. 1346.

BERNARD A. WAGGAMAN, GEORGE W. COLDENSTROTH, LATE COPARTNERS TRADING UNDER THE FIRM NAME OF B. A. WAGGAMAN & COMPANY, APPELLANTS,

vs.

GEORGE E. KEITH COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF MASSACHUSETTS; LEWIS A. CROSSETT, APPELLEES.

BRIEF FOR APPELLEES.

STATEMENT OF CASE.

This is an appeal from a decree dismissing a bill filed by the appellants against the appellees for the purpose of enjoining the prosecution of two suits at law brought by the respective appellees here against the appellants.

The bill in substance states that on April 20, 1900, the complainants, the appellants here, were indebted to the George E. Keith Company, appellee, in the sum of five hundred forty-one and 80/100 ($541.80) dollars, and to Lewis A. Cros sett, appellee, in the sum of three hundred thirty-one

and 50/100 ($331.50) dollars, and that they were, on the date aforesaid, the owners and possessors of a stock of shoes valued at eight hundred and ten and 60/100 ($810.60) dollars, cost price, or nine hundred and forty-five ($945) dollars, retail; that on said date the George E. Keith Company contracted with the complainants to accept said stock of shoes in full settlement and discharge of the debts due by the complainants to said George E. Keith Company and said Lewis A. Crossett, and further contracted and agreed to pay and discharge in full the debt due from complainants to said Lewis A. Crossett; that, in conformity with said contract, complainants delivered to the said George E. Keith Company said stock of shoes, and said George E. Keith Company accepted the same in full settlement and discharge of its own account and the account of Lewis A. Crossett; that thereafter the George E. Keith Company paid to Lewis A. Crossett, on account of the debt owing by complainants to him, the sum of eighty-three and 16/100 ($83.16) dollars, and credited its own account with the sum of five hundred and five and 13/100 ($505.13) dollars; that said George E. Keith Company fails and refuses to discharge the balance due on the Crossett account and fails and refuses to balance and close its own account against complainants, and repudiates said contract and agreement, but has never returned nor offered to return said shoes nor any part thereof; that said George E. Keith Company has brought suit against complainants to recover the sum of thirty-six and 67/100 ($36.67) dollars, and said Lewis A. Crossett has brought suit against complainants to recover the sum of two hundred forty-eight and 80/100 ($248.80) dollars, both of which actions are still pending. These, which are followed by certain conclusions of law and the prayers for relief, are all the essential facts averred in the bill.

The answer of George E. Keith Company denies that it ever contracted to accept the stock of shoes and pay the

debts due by the complainants to Crossett and itself, and alleges that one George H. Leach, its assistant credit clerk, on April 20, 1900, agreed with complainants to take back such part of said stock of shoes as had been supplied by it, sell them for the best price obtainable, and credit the proceeds on account of the debt due them; that while arrangements for the transportation of the goods, in accordance with such agreement, were being made, a Mr. Betz, buyer for a local shoe dealer, called with a view to purchasing the stock, and, after some conversation, in which Waggaman, one of the complainants, joined, it was agreed that he should take all of the Keith goods at seventy (70 %) per cent. of the invoice price; that Betz then inquired about the balance of the stock; was told that it consisted of goods of the manufacture of the defendant Lewis A. Crossett and goods of the manufacture of one Heywood, and it was then agreed between Waggaman, Betz, and Leach that the goods of the other manufacturers, Crossett and Heywood, should be sold also for seventy (70 %) per cent. of the invoice price and the proceeds credited in part payment of their respective accounts, provided the other manufacturer consented; that this arrangement was consummated, and this defendant received as the result five hundred and five and 13/100 ($505.13) dollars, which it credited on its account against complainants, leaving a balance of thirty-six and 67/100 ($36.67) dollars still overdue and unpaid, and subsequently Waggaman, and still later Waggaman and Fields, his attorney, acknowledged the balance claimed and promised settlement thereof. The answer prays the benefit of a demurrer.

Lewis A. Crossett's answer disclaims all knowledge of the alleged contract set up in the bill, and demands strict proof thereof; it sets up that the complainants on April 20, 1900, owed him the sum of three hundred thirty-one and 50/100 ($331.50) dollars; that about that time he received a telephone message from George E. Keith Company in reference

to the account of Waggaman & Company, as a result of which he agreed that stock of his manufacture in their possession should be sold and the amount realized therefrom credited on their account; that he never authorized any one to settle his claim against Waggaman & Company for less than the full amount thereof, and never heard of such a thing until after his claim had been placed with attorneys for collection. The answer prays the benefit of a demurrer.

By stipulation the cause was heard on bill, answers, affidavits, and testimony filed in the case and set forth in the transcript here.

ARGUMENT.

The bill sets up a contract on the part of the George E. Keith Company, and a breach of it for which the complainants have *an adequate remedy at law.* They may plead an accord and satisfaction to the suit brought by the George E. Keith Company and bring an independent suit against the George E. Keith Company, a perfectly solvent company, for the breach of contract and recover as damages the amount of the claim of Lewis A. Crossett. If they cannot sustain their plea by proof, they have no better standing in a court of equity than in a court of law.

Seven grounds of equity jurisdiction are claimed for the bill of complaint in the brief of the appellants.

The first is set-off, the appellees being non-residents. This ground is entirely inconsistent with the allegations of the bill, for if the facts therein stated are true the claims sought to be enforced were discharged by the acceptance of the goods and the proceeds derived from the sale thereof, and no cause of action would exist in favor of the appellants against the appellees, because there would be no breach of contract and no damage, thus robbing the case of the prime essential of set-off—*mutuality of debts or demands.* A set-off

against a non-resident is not sufficient to give a court of equity jurisdiction unless coupled with some other ground of equity jurisdiction.

Green *vs.* Darling, 5 Mason, U. S., 201.
Gordon *vs.* Lewis, 2 Sumn., U. S., 628.
Dade *vs.* Irwin, 2 How., U. S., 383.
North Chicago Rolling Mill Co. *vs.* St. Louis Ore Co., 152 U. S., 596.

The case of Smith *vs.* The Washington Gas Light Co., 31 Md., 12, opinion by the honorable chief justice of this court, decides this ground of equity jurisdiction in the negative.

The second ground of jurisdiction is fraud. Fraud is a legal as well as an equitable defense; the specific character of the fraud in this case is not indicated, and, unless a breach of contract is fraud, we are unable to perceive any allegation of it in the legal sense.

The third ground is injunction. We submit that the equity of a bill is not found in its prayers, nor in the legal conclusions of the pleader, and we fail to find any ground for injunction elsewhere.

The fourth ground is multiplicity of suits. Multiplicity of suits as a ground for equity jurisdiction obtains only in cases where it appears that identical matters are about to be litigated in numerous cases, the familiar illustrations being cases of continuing trespass or nuisances affecting a number of persons (Story's Equity).

The fifth ground is accounting. Equity has jurisdiction of matters of account only where they are mutual and where the bill prays for discovery, and *a fortiori* where there are no mutual demands, but a single matter on one side and no discovery is required, a court of equity will not entertain jurisdiction of the suit, though there may be payments on the other side which may be set off, for in such a case there is not only a complete remedy at law, but there

is nothing requiring the peculiar aid of equity to ascertain or adjust it (Story's Equity, p. 440).

The sixth ground is assumption of debt. The jurisdiction of equity to enforce a contract whereby a debt of a third party is assumed is predicated upon the absence of a remedy at law, and can only arise where the promise is one by a third person to the *debtor* to discharge his debt to the creditor, the ground of the jurisdiction in such a case being that, while there is not such a privity of contract between the third person and the creditor as will authorize a suit at law, yet in equity the creditor may have the benefit of any obligation or security given for the payment of the debt. The principle is frequently illustrated in suits by mortgagees against the purchasers of the mortgaged property who have assumed the payment of the mortgage.

Keller *vs.* Ashford, 133 U. S., 610.
Willard *vs.* Wood, 135 U. S., 309.

In this case the promise was not to the debtor, but to the creditor; the remedy at law is therefore perfect.

The seventh ground is mistake of fact. There is nothing in the bill to support this ground of equity jurisdiction.

There are other grounds of equity jurisdiction, equally well known, which the appellants do not seem to claim for their bill; without entering upon the broad field of legal discussion the thought suggests, we submit that they also are not applicable to the case at bar.

THE FACTS.

All the allegations of the bill with respect to the alleged contract between Waggaman & Company and Keith are denied in the answer (R., 13), in the affidavit of Leach (R., 19), in the testimony of Leach (R., 30, 31, 34, 35, 36, 44, 45, 46, 47). The testimony of Leach with respect to the promise by Waggaman to pay the balance on Keith's account, and

with respect to Waggaman's statement that a settlement with the landlord would prevent an immediate settlement thereof, is corroborated by Waggaman's letter to Keith, written two months after (R., 16, 36). This letter itself constitutes an admission of the liability of the firm.

An admission by one partner, made after dissolution of the firm, in relation to facts which took place during the existence of the partnership, is admissible against the firm.

Wood *vs.* Braddick, 1 Taunt., 104.
Cochran *vs.* Cunningham, 16 Ala., 448.
Parker *vs.* Merrill, 6 Me., 41.
Darling *vs.* Marsh, 22 Me., 184.
Cady *vs.* Shepherd, 11 Pick. (Mass.), 400.
Bridge *vs.* Gray, 14 Pick. (Mass.), 55.
Pennoyer *vs.* David, 8 Mich., 407.
Curry *vs.* Kurtz, 33 Miss., 25.
Mann *vs.* Locke, 11 N. H., 246.
Rich *vs.* Flanders, 39 N. H., 304.

There was no dispute between the parties as to the amount of the debts due by appellants to appellees. The alleged contract to accept less than the full amount was therefore void, as being without consideration.

American & English Encyc., vol. 6, p. 754, and cases cited.

Lewis A. Crossett is in no way connected with the alleged contract; he had never authorized Leach or any one else to settle his claim with Waggaman & Company, and had never heard of such a contention on the part of Waggaman until after he had placed his account with his attorneys for collection (R., 18, 22). Leach neither had nor claimed authority to bind Crossett by contract (R., 31, 34, 45, 47). It is insisted, however, that Crossett became informed of the contract alleged to have been made between Keith and Wagga-

man & Company; and having failed after discovery thereof to repudiate it and surrender the fruits thereof, he is bound by it.

The testimony fails to show that Crossett ever became aware of the contentions of the appellants until after they had placed their claim for collection, and when they did learn of the alleged contract they refused to believe it. The truth of the matter with respect to the alleged contract is the very issue in the case. How can they be estopped to deny a contract which they believed was never made and which they never authorized?

Crossett's conduct was in entire accord with what he believed was the arrangement entered into between Keith and Waggaman, and we submit that the evidence shows this belief to have been correct.

While equity will enjoin a defendant from setting up a threatened defense upon the ground that he is equitably estopped from so doing, it will do so *only in cases where the facts constituting the estoppel are undisputed.*

Davis *vs.* Wakelee, 156 U. S., 681.

We submit that the bill is without equity, and that upon the whole record the facts are with the appellees.

Respectfully submitted.

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